Supreme Court, U.S.
FILED

02 839 NOV 27 2002

OFFICE OF THE CLERK
No.

IN THE
SUPREME COURT OF THE UNITED STATES

NORMAN A. BRITTING,

Petitioner,

v.

MOTOROLA INC., JOHN DOE 1-10 and
ABC CORPORATION 1-10

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

Roy S. Mullman,

Georgia State Bar Number: 529277

Mullman & Associates, P.C.

Counsel for Record

One Live Oak Center, Ste. 980

Atlanta, Georgia 30326

(404) 365-8800

112pp

QUESTIONS PRESENTED

I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ABUSED ITS DISCRETION WHEN IT ERRONEUOUSLY DISMISSED THIS CASE PURSUANT TO A LOCAL RULE WITHIN THE FEDERAL RULE OF APPELLATE PROCEDURE 42 AFTER SAME COURT HAD PREVIOUSLY DISMISSED AND REINSTATED SAID CASE FOR A CLERICAL ERROR.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Norman A. Britting v. Motorola, Inc., John Doe 1-10 and ABC Corporation 1-10

Norman Britting
Holland & Knight, LLP
Motorola, Inc.
Mullman & Associates, P.C. Roy Mullman, Esquire
Mary Ann Oakley, Esquire

The following is a list of others related to Motorola, Inc. with an interest in this case:
Ablatar S.A.
Acadia AIC, Inc.
Accats Control Center, Inc.
Access Spectrum, LLC
Avanced International Electronic Equipment Company
Aerocast.com, Inc.
Air Communications Information Services Limited
Amplevalue Limited
Anadyne Microelectronics Limited
Appeal Telecom Co., Ltd.
APTE, Inc.
At Horns Network Solutions, Inc.
Avantel Holdings Ltd.
Baja Celular z Mexicana, S.A. de C.V. ("Baja Celular")
Baja Celular Servicios Corporativos, S.A. de C.V.
Baksell II
Bay Tel Communication, S.A.
Beeper Communications Israel Ltd.
Beepwear Paging Products L.L.C.
Beepwear Paging Products N.V.
Beijing Huamin Smartcard System Manufacturing Co. Lt.

Broadband Innovations, Inc.
Buenaventura S.A.
Cport Corporaton
Cable Network Associates, Inc.
Cacheon Inc.
Call Tel Corporation
Celcom, Inc.
CallMania.com Inc
Celnor Inc.
Celular de Telephonia S.A. de C.V.
Centel Cellular Company of Mexico
Centerpost Corporation
Car-Wat Corporation
Certicom Corporation
China Prosperity Investments Ltd.
CityLink Telecommunications Holdings Ltd.
Clinical Micro Sensors Inc.
Closed Stock Company Omnitel
CME Telematrix Inc.
Command Audio Corporation
CommLaunch Ventures L.P.
Communicate Limited
Compagnie des Machines Bull
Compania de radio communicaciones Moviles S.A.
Compania de Telefonos del plata S.A.
Compliance Engineering Ireland Limited
Communicaciones Multiples J.V. de Costa Rica Sociedad Anonima
Communicaciones Multiples S.A. Mullicom
Corporacion Integral de Communicaciones S.A. de C.V. (cinco)
CTX International
CWXT Inc.
Cynergy System design Inc
DBS Services Inc
Digianswer A/S
Digianswer Ireland Limited

Digital ADCO Inc.
Digital Latin America LLC.
Diversified Software Industry
DLA Partners Inc
Dolphin Telecom Beteiligungsgesallschefl mbH
DPI Retlcle Technology Center LLC
Dynamic Digital Depth Inc.
E Inc Corporation
Earth Acquisition Corporation
Egyptian Company for mobile services
Egyptian Company Holdings Inc.
AmWare Inc
Ensambladora de Metamoros S.A. de C.V.
Ental PCS Telecommunications S.A.
Entel Telefonia Movil S.A.
Entel Telefonia Personal S.A.
EPSILON Grundstuckverwertungs AG
ERG Limited
EUV LLC
Everwell Times Limited
First International Digital Inc
FitSense Technology Inc
Flextronics International (Bermuda) Ltd.
FLISA Inc
Fonbox Inc.
Foresight Systems Inc.
FreaDrive Inc
Fuba Communications Systems GmbH
General Instrument Authorization services
General Instrument China Holdings Inc
General Instrument China Holdings inc.- Beijing Representative office
General Instrument Corporation
General Instrument Corporation (Chile) Limitada
General Instrument Equity corporation

General Instrument Holdings (Taiwan) Inc
General Instrument International Inc
General Instrument Microelectronics limited
General Instrument Numberg GmbH
General Instrument of Taiwan Ltd
General Instrument Packet Systems Inc.
General Instrument Purchasing Corp.
General Instrument Services limited
General Instrument Services Inc.
General Instrument (Argentina) S.A.
General Instrument (Australia) Pty Ltd.
General Instrument (Belgium) B.V.B.A
General Instrument (Brasil) Ltda
General Instrument (Canada) Inc
General Instrument (Europe) Limited
General Instrument (France) SAS
General Instrument (Hong Kong) Limited (with Chinese Co. Nama)
General Instrument (India) Inc
General Instrument (Japan) Ltd
General Instrument (Mauntlus) Inc
General Instrument (Mexico) S.A. de C.V.
General Instrument (Music Services) Ltd
General Instrument (Singapore) Pte Ltd
Genometrix Incorporated
GFN Communicaciones S.A. (Communicaciones)
GI India Private Limited
GI Mauritus Holdings Ltd.
GlobalTelecom S.A.
GMP Companies Inc
GMP Wireless Medicine Inc
GoAhead Software Inc
Gotuit Media Corp
Grupo Corporative Del Norte S.A. de C.V.
Grupo Portatel S.A. de C.V.
GTIB 1996 Ltd.

Guangzhou Jinpeng Mobile Communications Systems
Limited
Hangzhou Eastcom Cellular Phone Co. Ltd
Hangzhou Motorola Cellular Equipment Co. Ltd.
High- tech Nachrichtentechnische Anlagen Gasellschaft m.b.H.
Home director Inc.
Huagang General instrument Co. Ltd.
Huamin Smartcard system Co. Ltd.
Hutehison Telephone Company Limited
ICAM de Guatemala, S.A., de C.V.
Iconix Pharmeceuticals Inc.
ICTV Inc
Impel Inc
Indala Corporation
InfoPower Inc
Ino Services especialzsdos de Telecomunicacoes Ltda
Integrated Transit Sollutions (Sing) Pte Ltd
International Netwroks Division Acquistion Corporation S.A.
Internet Pictures Corporation
Interphase Corporation
INVISIX Asia Pacific Inc
Invisix Limited
Invisix inc
IPC Holding Corporation
Indium Argentina S.A.
Indium Canada US inc
Indium Canada Inc.
Indium Central America and Mexico Inc.
Indium Chile S.A.
Indium Colombia Ltda
Indium de Honduras S.A.
Indium Mexico S.A. de C.V.
Indium de Nicaragua
Indium de Panama S.A. de C.V.
Indium Del Equador S.A.

Indium El Salvador
Indium India telecom Ltd.
Indium LLC
Indium Peru S.A.
Indium SudAmerica- Brasil Ltda
Indium SudAmerica Corporation
Indium Trinidad & Tobego Limited
Indium U.S. L.P.
Indium Venezuela C.A.
Ischua Creek Holding Company Inc
Jerrold DC Radio, Inc
Jordan Mobile Telephone Services Company limited
Lear Motorola Integrated Solutions LLC
Leo Satelite services, Inc
Leshan Phoenix Semiconductor Company Ltd.
Lineo Inc.
LynuxWorks Incorporated
Macraigor Systems LLC
MDB Services Ltda
MDI Puerto Rico Inc
Media Station Inc
Media Technology Ventures Entrepreneurs Fund L.P.
Media Technology Ventures L.P.
Meltronix Inc
Metrowerks AG
Metrowerks Company
Metrowerks Corporation
Metrowerks GmbH
Metrowerks Holdings Inc.
Metrowerks Co., Ltd.
Metrowerks Inc.
Microunity Systems Engineering Inc.
Microware Systems Corporation
MIRS Communications Ltd
Molecular Staging Inc.

Mobat Communications Ltd
Mobile Data Service Company Ltd
MobilEye Vision Technologies Limited
Mobilkom A.S.
Mocel inc
Moroccan Company Holdings Inc.
Motif Inc.
Motocom d.o.o.sa p.o. Novi Sad
Motorola AE (Greece)
Motorola Aircommunications limited
Motorola Arabia Communications Inc
Motorola Arabia Inc
Motorola argentina S.A.
Motorola Asia Limited
Motorola Asia pacific Limited
Motorola Asia Pacific Pte Ltd
Motorola Asia Treasury Pte Ltd.
Motorola Australia Holdings Inc.
Motorola Australia Proprietary Limited
Motorola Automotive Energy and Controls Products Inc.
Motorola A.B.
Motorola A.C. Inc
Motorola A/S
Motorola Betriebsfunk Ges. M.b.H
Motorola B.V.
Motorola Canada Acquisition Corp.
Motorola Canada Limited Motorola Canada Limitee
Motorola Capita Trust I
Motorola Cellular Services Inc. (California)
Motorola Cellular services Inc (Illinois)
Motorola Chile S.A.
Motorola China Inc
Motorola Communications and Electronics Inc.
Motorola Communications International Inc
Motorola Communications Israel Limited

Motorola Communications Philippines Inc.
Motorola Communications SRL
Motorola Computer Group Inc.
Motorola Core Ventures Inc
Motorola Credit Corporation
Motorola CVD Inc
Motorola de Bolivia S.A.
Motorola de Centroamerica S.A.
Motorola de Colombia Limitada
Motorola de Costa Rica S.A.
Motorola de El Salvador S.A.
Motorola de Guatemala S.A.
Motorola de Inversiones S.A.
Motorola de la Republica Dominica S.A.
Motorola de mexico S.A.
Motorola de Puerto rico Inc.
Motorola de Venezuela C.A.
Motorola del Equador S.A.
Motorola del Paraguay S.A.
Motorola del Peru S.A.
Motorola de Brasil Ltda
Motorola Egypt Limited
Motorola Electronica de puerto Rico Inc
Motorola Electronica Australia Pty limited
Motorola Electronica Pte Ltd
Motorola Electronica Sdn. Bnd.
Motorola Electronica S.P.A.
Motorola Electronica Taiwan Ltd.
Motorola Electronique Automobile S.A.
Motorola Espa/la S.A.
Motorola Finance B.V.
Motorola Foreign Sales corporation
Motorola Foundation
Motorola Funding Corporation
Motorola Gesellschaft m.b.H.
Motorola Global telecom Solutions Inc.

Motorola GmbH
Motorola Holdings Inc.
Motorola Hungary Communications KFT (Motorola Magyarorszag Kommunikacios KFT)
Motorola India Electronics Limited
Motorola India private limited
Motorola Industrial Ltd.
Motorola International Capital Corporation
Motorola International Inc.
Motorola International Network Ventures. Inc.
Motorola International paging Inc.
Motorola Ireland limited
Motorola Indium Network investments Inc.
Motorola Israel Information Systems Limited.
Motorola Israel Investments (1971) Limited
Motorola Israel Limited
Motorola Israel Semiconductor Products (SPS) Ltd.
Motorola Japan Limited
Motorola Jersey limited
Motorola Komunikasyson Ticarat Ve Servis Limited Sirketi
Motorola Korea technology center Ltd.
Motorola Korea Inc.
Motorola Lighting Inc.
Motorola Limited
Motorola Lithuania Telecom Inc.
Motorola Malaysia Sdn. Bhd.
Motorola Maroc SA
Motorola MCSC Inc.
Motorola Mexico Holdings Inc.
Motorola Multimedia Sdn Bhd
Motorola Network Solutions Corporation
Motorola New Zealand Limited
Motorola NMG Brasil Ltda
Motorola NMG Brazil Inc.

Motorola Norway A/S
Motorola Pacific Communications Inc.
Motorola Polska Electronics spoika z.o.o
Motorola Polska Spz.o.o
Motorola Portugal Comunicacces Lda
Motorola properties Ltd.
Motorola Radio Systems BV
Motorola Receivables corporations
Motorola Satelite Communications
Motorola Satelite holdings Inc.
Motorola Semiconducteurs S.A.
Motorola Semiconductors Israel limited
Motorola Semiconductors Products Inc.
Motorola Semiconductors Hong Kong Limited
Motorola services de Chile S.A.
Motorola Smartcard Solutions Korea Ltd.
Motorola SMR Inc.
Motorola south- Israel limited
Motorola South- Asia Pte Ltd.
Motorola Southern Africa (Proprietary) Limited
Motorola Space and Electronics inc.
Motorola Specrtum inc.
Motorola Sud America Holdings inc.
Motorola S.A.
Motorola S.p.A.
Motorola S.R.O.
Motorola Technology sdn bhd
Motorola Trunking Holding S.A.
Motorola Ukrainian investments Inc
Motorola UPC Holdings inc.
Motorola Uraguay S.A.
Motorola Vietnam Telecommunications Company

Motorola Worldwide Information Network Services Inc.
Motorola ZAO
Motorola (China) Electronics Ltd
Motorola (China) Investments Limited
Motorola (Holdings) Pte. Ltd.
Motorola (Suisse) S.A.
Motorola (Thailand) Limited
Movicelular S.A. de C.V.
Movisarviclos S.A. DE C.V.
Movitel Del Noroeste S.A. de C.V. ("Movitel")
MSC
M.I.L. FINO LTD.
Neorlife Inc.
Netspeak Corporation
Network Management Inc.
Network ventures III Inc.
Network ventures II Inc.
Network ventures I Inc.
Network Ventures long Distance Medical holdings Inc.
Network Ventures Telecom Mexico Inc.
Next level Communications inc.
Nextel communications Inc
Nextel Partners Inc.
NextLevel Systems (Puerto Rico) Inc.
North African Cellular Investments Ltd.
NVE Corporation
NxView Technologies Inc.
Old TG Corp.
OmniLink S.A.
On Data Inc.
OpenGrid Inc
OpenTV Corp
OpenTv integration Company
Ozitel Networks Pvt. Limited
Pakistan Mobile Communications (Pvt) Ltd.

(Mobillink)
Pantech Co., Ltd.
Paratek Microwave Inc
Pause technologies LLC
Paila Investment Company Limited
Perceptual Robotics Inc
Personal Security and safety Systems Inc
Phanitec Semiconductor Corporation
Pico Design Inc
Plumb Design Inc
Point.com Inc
Portatel Del Suraste S.A. de C.V.
Printrak de Argentina S.R.L.
Printrak International Inc.
Printrak International Limited
Printrak International Pty. Ltd.
Pro-Log Corporation
Procall Limited
Propel Asia Limited
Propel UK Limited
Propel Inc
Protozoa. Inc.
PT Motorola Indonesia
RadioWave.com
Red Bank Research
Repetidora Comunitaria S.A.
Santiago Trunking S.A.
SCG Holding Corporation
SecuraOps. Inc.

Servicios de Arrendamientos ICAM S.A. de C.V.
Setcom Net Trank haberlesme Isletmecllgl A.S.
Shanghai Motorola Paging Products Co. Ltd.
Shanghai Zhong Mei Automotive Electronics Co. Ltd.
Sharpstep Limited
Sigma Insurance Company (Bermuda) Ltd.
Signals and Software Limited
SMART Microelectronics India Private limited
Sociadad de Servicos de Valer Argregado S.A.
Software Corporation of America Inc.
Soluciones Celulares S.A. de C.V.
Space System license Inc
SpectraPoint Wireless LLC
SportsTrax Products Inc
Sportvision Inc
Starfish Software Inc
Suncoast Scientific Incorporated
Symbian Limited
S.A. Notorola N.V.
Talking Drum Inc.
Talk Thru Canada Inc.
Tamcel, S.A. de C.V. ("Tamcel")
Tao group Limited
TCS Insurance Company of Ireland Limited
Technology investments international Inc.
Telcei S.A.
Telecommunications Trunking S.A.
Teladesic LLC
Telefonia Celular del Norte S.A. de C.V.

Telefonica Cellular S.A.
Tellular Corporation
Tennessee Holdings Inc.
The Interactive Enterprise Limited
The Nextlevel Systems Foundation
Theseus Logic Inc.
TissueInformatics Inc.
TM Data Brasil Ltda.
Todo Para Celulares S.A. de C.V.
Tohoku Semiconductor Corporation
Tokyo Web Link Inc.
TPI Transmission Services Inc.
Traffucmaster Europe GmbH
Tricom USA Inc.
TRICOM S.A.
Triumphant Launch Sdn Bhd
Trunking Network S.A.
TU-KA Cellular Tokyo inc.
Uni-Net Sp. Z o.o.
U.S. Leo Services Inc.
Virtus Entertainment Inc.
VM labs Inc.
Volcano Communications Technologies AB
Watchpoint Media Inc.
WaveMark Technologies Inc.
Web Product Realization Network Inc.
WIN Systems Ltd.
Wireless Network Ventures Ltd.
Wireless Solutions S.A.
Wireless SP Inc.
WSNet Holdings Inc.
Zamba Corporation
Zephyr Telecommunications Inc.

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STATEMENT REGARDING THE ADOPTION OF BRIEFS OF OTHER PARTIES

No brief of other parties has been adopted in this Application for Writ of Certiorari

STATEMENT OF JURISDICTION

The United States Supreme Court has discretionary jurisdiction over this lawsuit, which involves a federal question, specifically ADEA, and other state law claims including breach, fraud, and tortuous conduct. The United States District Court for the Northern District of Georgia, Atlanta Division, denied Plaintiff/Appellant's Motion for Summary Judgment on his claims of Breach and Fraud. This was not a final order in and of itself, however, in conjunction with the District Court's granting Defendant/Appellee's Motion for Summary Judgment on these issues, the District Court made a final decision.
Thereafter, the United States Court of Appeals for the Eleventh Circuit dismissed the aforementioned appeal pursuant to Federal Rules of Appellate Procedure 42-2 and 42-3.
Thus, Petitioner is seeking the discretionary grant of its Application for Writ of Certiorari pursuant to 28 U.S.C. § 1254 which states in pertinent part:

> Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Petitioner respectfully requests that the United States Supreme Court remand this case back to the Eleventh Circuit Court of Appeals to review the merits of this case, a case that was only administratively dismissed and never read for its underlying facts.

SUMMARY OF ARGUMENT

I. PROCEDURAL HISTORY OF APPEAL

This case involves two administrative dismissals of an appeal by the United States Court of Appeals of the Eleventh Circuit, to which the merits of said case were never once reviewed by the Court of Appeals. On March 21, 2002 Plaintiff/Appellant filed a timely Notice of Appeal with The United States District Court for the Northern District of Georgia, Atlanta Division, of an Order granting Defendant/Appellee's motion for sanctions in part, granting Defendant/Appellee's motion for summary judgment and granting Defendant/Appellee's motion for default judgment on its counterclaim against Plaintiff/Appellant. Said Order was entered on March 7, 2002.

On March 25, 2002, the Clerk of the District Court notified Appellants that they needed to pay the docketing/filing fee of $105.00 to the United States District Court. On March 28, 2002, the Clerk of the United States Court of Appeals for the Eleventh Circuit notified Appellants that they must pay the $105.00 filing fee and file the Civil Appeal Statement with the Clerk of the United States Court of Appeal, Eleventh Circuit within fourteen days. On March 28, 2002, Plaintiff/Appellee submitted a money order in the amount of $105.00 to the Clerk of the District Court. On April 3, 2002, Plaintiff/Appellee submitted its Civil Appeal Statement. On April 16, 2002 the Clerk of the United States Court of Appeals entered a Dismissal of the instant Appeal for alleged failure to prosecute the appeal, by failing to pay the aforementioned docketing fee, pursuant to 11th Circuit Federal Rules of Appellate Procedure Rule 42-1(b). Said rule specifically states:

Dismissal of Appeals

(b) Dismissal for Failure to Prosecute. Except as otherwise provided for briefs and record excerpts in civil appeals in 11th Cir. R. 42-2 and 42-3, when appellant fails to file a brief or other required papers within the time permitted, or otherwise fails to comply with the applicable rules, the clerk shall issue a notice to counsel, or to pro se appellant, that upon expiration of 14 days from the date thereof the appeal will be dismissed for want of prosecution if the default has not been remedied by filing the brief or other required papers and a motion to file documents out of time. Within that 14-day notice period a party in default must seek leave of the court, by appropriate motion, to file documents out of time or otherwise remedy the default. Failure to seek such relief by filing timely an appropriate motion will result in dismissal for want of prosecution. The clerk shall not dismiss an appeal during the pendency of a timely filed motion to file documents out of time or otherwise remedy the default which is accompanied by the brief or other required papers, but if the court denies such leave the clerk shall dismiss the appeal forthwith. If an appellant is represented by appointed counsel, the clerk may refer the matter to the court for possible disciplinary action against counsel in lieu of dismissal.

Thereafter, on April 22, 2002, Appellant filed is Motion to Reinstate the Appeal, along with its Civil Appeal Statement, showing that in fact the docket fee was paid by money order. The money order was received and redeemed by the District Court on April 4, 2002, but apparently an inadvertent accounting error resulted in a showing that the fee had not been paid. **After consideration of Appellant's evidence of payment and apparently some forensic accounting by the clerk, the appeal was clerically granted and reinstated.**

On April 26, 2002 the clerk of the Court of Appeals contacted the parties and expressed a doubt as to whether the Court had jurisdiction over the case and requested that the parties advise the Court of their positions regarding the jurisdictional question of whether a final order was entered by the District Court. Appellant filed its brief regarding jurisdiction showing that a final order had been entered by the District Court, along with its Certificate of Interested Persons and Corporate Disclosure Statement.

Thereafter on June 13, 2002 the Clerk of the United States Court of Appeals entered a second Dismissal of the instant Appeal, pursuant to 11th Cir.R.42-2(c), for want of prosecution for alleged failure to timely file brief and record excerpts within the time fixed by the rules. The Appellant never received notice from the Court of Appeals as to its decision regarding jurisdiction nor did the Appellant received notice that is brief and record excerpts were overdue. In order to remedy said dismissal, on June 25, 2002, Appellant filed a Motion to Set Aside the Dismissal and Reinstate the Appeal, followed by the filing Appellant's Brief and Record Excerpts on July 18, 2002. Unfortunately, on July 30, 2002 the Appellant's Motion to Set Aside the Dismissal and Reinstate the Appeal was Denied and the clerk, in light of said Order, returned the unfiled briefs and record excerpts to Appellant.

Thereafter, on August 8, 2002, Appellant filed a Motion to Reconsider the Order and Reinstate Appellant's Appeal along with the required Appellant's Brief and Record Excerpts pursuant to 11th Cir.R 42-2(e). Said rule provides:

> (e) Motion to Set Aside Dismissal and Remedy Default. *An appeal dismissed pursuant to this rule may be reinstated only upon the timely filing of a motion to set aside the dismissal and remedy the default showing extraordinary circumstances, accompanied by the required brief and record excerpts.* Such a motion showing extraordinary circumstances, accompanied by the required brief and record excerpts, must be filed within 14 days of the date the clerk enters the order dismissing the appeal. *The timely filing of such a motion, accompanied by the required brief and record excerpts, and a showing of extraordinary circumstances, is the exclusive method of seeking to set aside a dismissal entered pursuant to this rule.* An untimely filed motion to set aside dismissal and remedy default must be denied unless the motion demonstrates extraordinary circumstances justifying the delay in filing the motion, and no further filings shall be accepted by the clerk in that dismissed appeal.

As history seems to repeat itself, said Court the denied Motion for Reconsideration on August 29, 2002, forcing Appellant to file this Petition for Writ of Certiorari to the United States Supreme Court respectfully requesting a remand back to the Court of Appeals.

II. ARGUMENT AND AUTHORITY

The United States Court of Appeals abused its discretion when it erroneously dismissed this case pursuant to a local rule added within the Federal Rule of Appellate Procedure Rule 42 after same court had previously dismissed and reinstated said case for another clerical error. The Federal Rule of Appellate Procedure Rule 42 outlines in general how a party may voluntary dismiss an appeal whether in the District Court or in the Court of Appeals.

The Court of Appeals for the Eleventh Circuit has "certain responsibilities for the effective and expeditious administration of justice within the circuit." U.S.Ct. of App. 11th Cir. Prec. FRAP 1, Refs & Annos, 28 U.S.C.A. In general, Rule 47 of the Federal Rules of Appellate Procedure provides a basis for each court of appeals, "to make and amend rules governing its practice that must be consistent with-but not duplicate of –Acts of Congress and rules adopted under 28 U.S.C. Section 2072." The Court of Appeals are limited by said rule in that "**a local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.**" FRAP Rule 47(2).

Using its discretion under Rule 47, the United States Court of Appeal for the Eleventh Circuit adopted rules to supplement the provisions of law and Federal Rules of Appellate Procedure. Specifically, the Court of Appeals for the Eleventh Circuit supplemented Federal Rule of Appellate Procedure Rule 42 with two additional provisions. See 11th Cir. R. 42-1, 42-2.

These three supplemental appellate rules allow for clerks of the court to administratively dismiss an appeal *prior to the court ever reviewing the merits of the said case, whereby causing a party to lose his rights because of a nonwillful failure to comply with the court's requirement.*

Even though Rule 47, of the Federal Rules of Appellate Procedure, grants courts of appeals the discretion to "make and amend rules governing its practice", clerks must not have the discretion to dismiss appeals for alleged nonfailure to comply with local requirements. Clerical dismissals based on administrative errors cause appellants to lose their rights in that the Court itself never reviews the case for its underlying merits.

The Court of Appeals for the Eleventh Circuit abused their discretion when clerks administratively dismissed said appeal on two separate occasions. The Clerk from the Court of Appeals erroneously dismissed the appeal the first time for alleged failure to submit the appropriate filing fees. This administrative and clerical error forced the Petitioner to explain and prove the fact that the docket fee was paid in a timely manner. Once Petitioner overcame that hurdle, he was then placed in a position to explain why the Court of Appeals had proper jurisdiction in the underlying case. Prior to receiving a response from the Court of Appeals as to the jurisdictional question, Petitioner again faced a second administrative dismissal for alleged failure to timely file appropriate brief and record excerpts.

Thereafter, Petitioner followed the local court rule supplemented by the Court of Appeals for the Eleventh Circuit and filed a Motion to Set Aside the Dismissal and Remedy the Default. U.S. Ct. of App. 11th Cir. Rule 42-2, 28 U.S.C.A. This exclusive remedy allows for a dismissal to be reinstated only upon the timely filing of a motion showing extraordinary circumstances attached with the appropriate number of briefs and record excerpts. Petitioner timely filed said motion and briefs and outlined to the Court of Appeals the extraordinary circumstances endured by the Petitioner. Said extraordinary circumstances incorporated the following:

1. the first clerical error that caused the clerk to dismiss the appeal
2. followed by the lack of response to the jurisdictional question in the underlying suit, and
3. concluded with the second administrative dismissal due to alleged failure to file said brief and excerpts.

Once the court denied said motion to set aside the dismissal, Petitioner then timely filed a Motion to Reconsider the Order Denying Appellant's Motion to Reinstate the Appeal with attached brief and record excerpts. However, as history tends to repeat itself, said motion was denied and the Court of Appeals for the Eleventh Circuit never once read the merits to the underlying case, *whereby causing a party to lose his rights because of a nonwillful failure to comply with the court's requirement.*

III. CONCLUSION

Petitioner respectfully requests that this Honorable Court grant this petition for writ of certiorari and remand this case back to the Court of Appeals of the Eleventh Circuit. Petitioner contends that he appropriately complied with the local rules of the Court of Appeals for the Eleventh Circuit in filing the notice of appeal and all other accompanying documents. However, the clerks of the Court of Appeals abused their discretion when they erroneously dismissed the appeal on two separate occasions for alleged filing errors, one of which was proven to be an administrative error. Petitioner should not lose out on his rights to have his case reviewed by the higher court by an administrative error and respectfully requests that the United States Supreme Court grant this petition.

APPENDIX

Name of Document	Exhibit Number
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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NORMAN A. BRITTING,	:	Filed In Clerk's Office
	:	U.S.D.C. Atlanta
Plaintiff,	:	February 5, 2001
	:	Luther D. Thomas, Clerk
	:	By: Deputy Clerk
	:	
vs.	:	CIVIL ACTION
	:	FILE NO.
	:	1:01-CV-0339
MOTOROLA INC., :		
JOHN DOE 1 – 10 and	:	
ABC CORPORATION 1 – 10, :		
	:	
Defendants.	:	

COMPLAINT

COMES NOW Plaintiff and respectfully states as follows:

1.

This action arises under the Age Discrimination in Employment Act, 29 U.C.S.A. §§621-634, and jurisdiction is conferred on the Court under the provisions of Title 28 U.S.C. Sections 1331, 1332, 1343 and 1367 and under such laws as may apply.

EXHIBIT 1

2.

Defendant Motorola, Inc., is a Delaware corporation qualified to do business in Georgia and whose registered agent of process is CT Corporation Systems located at 1201 Peachtree Street, Atlanta, Fulton County, Georgia. Thus, venue is proper in this Court.

3.

The Defendant Motorola (Atlanta) is in the business of manufacturing and sale of consumer electronics with offices and employees throughout the United States, Europe, Asia, Africa, and Australia.

4.

At all times material to the dispute in this matter, the Plaintiff, a white male over the age of 40, was employed by Defendant at their offices located 2121 Newmarket Parkway, Suite 130, Marietta, Georgia 30067-8790 as a Consulting Systems Engineer for the Information Systems Group.

5.

The Plaintiff was hired by the Defendant on or about January 29, 1982.

6.

The Plaintiff was originally hired by the Defendant in their Seattle, Washington location and at all times material hereto, the Plaintiff has been transferred to several locations, including but not limited to the following: Mansfield, Massachusetts and Marietta, Georgia.

7.

On or about April 1996, the Plaintiff was induced by the Defendant under false pretences into being transferred to Marietta, Georgia under his current position with responsibilities including but not limited to the following: specifying products for sale and assisting internal and external sales agents in those sales areas.

8.

At all times material hereto, including on or about April 1996, the Plaintiff was induced by the Defendant while working in Mansfield, Massachusetts to make a lateral transfer under the

purported terms of the Service Club 10-Year Employee Program. More specifically, an ultimatum was given to the Plaintiff to leave or accept the transfer position.

9.

At all times material hereto, Plaintiff performed all tasks required by Defendant.

10.

The Plaintiff devoted and devotes his full time and best efforts to the business of Motorola Corporation Marietta, including but not limited to managing, developing and expanding the business in a profitable manner.

11.

On or about June 10, 1999 at the Marietta, Georgia office of Motorola, Plaintiff was summoned into a meeting with no notice, and advised that his resignation was accepted.

12.

At no time has the Plaintiff ever tendered his resignation to the Defendant.

13.

At all times material hereto, including but not limited to, June 10, 1999, Plaintiff was advised that he had twenty-one (21) days in which to find new employment based upon the acceptance of his resignation. Said twenty-one (21) days was based on the Service Club 10-Year Employee Program.

14.

On or about July 15, 1999, Mr. Dave Gowen traveled from Dallas to Marietta (the Georgia Motorola Office where Plaintiff was employed), to collect Plaintiff's Motorola badge and Motorola property.

15.

At all times material hereto, including, but not limited to, the June 10, 1999 meeting with Mr. Dave Gowen, Plaintiff was presented with a termination package which mainly consisted of "entire release language". Again, this was a repeated pattern by Motorola as was evidenced by the prior transfer from Mansfield wherein they induced and blackmailed Plaintiff. However, this

termination package including a release that the Plaintiff would have to give up all his rights pursuant to Georgia and Federal Law. This was presented to the Plaintiff without legal representation afforded to the Plaintiff and without the opportunity for Plaintiff to seek legal representation.

16.

On July 15, 1999, the Plaintiff was advised that he had an additional ninety-(90) days to find employment again based on the Service Club 10-Year Employee Program.

17.

Subsequent to this time, the Defendant, and several of Defendant's employees, conspired together amongst themselves when Plaintiff refused to sign the forced releases.

18.

As a result of Plaintiff's refusal to be blackmailed, Defendant has precluded Plaintiff from obtaining future employment, and has continued to conspire to set up the Plaintiff and cause his termination.

19.

At all times material hereto, including, but not limited to, the month of March 2000, the Plaintiff was given his annual performance review wherein Defendant retaliated against Plaintiff by giving him a false inadequate performance review.

21.

As of the date of filing this Complaint, the Defendant has breached its contract with Plaintiff.

22.

On August 15, 2000, Plaintiff, an engineer, was demoted to a position of answering phones while two similarly-situated employees who remained in their jobs are younger than I.

23.

Plaintiff was not provided a reason for the demotion.

24.

On or about Thursday, January 4, 2001, Plaintiff was advised to attend a personal meeting with Mr. John Chevry, employee of the Defendant Motorola, in order to discuss his involuntary termination.

25.

At no time prior to said date as indicated supra, was the Plaintiff given any notice concerning said meeting and/or the contents of said meeting regarding his involuntary termination.

26.

On or about January 5, 2001, at approximately 10:30 a.m., the Plaintiff attended a meeting at his office located at 1000 Abernathy Road, Atlanta, Georgia.

27.

At all times material hereto, including the January 5, 2001 meeting as referenced supra, the Plaintiff was present as requested for the meeting with Mr. John Chevry and via telephone conference with a Motorola employee/agent who was located in Mansfield, Massachusetts.

28.

During said meeting, the Plaintiff was verbally advised concerning his involuntary separation and was further advised concerning what the package would include.

29.

Immediately subsequent thereto, the Plaintiff was given personally the involuntary separation package.

30

On January 26, 2001, Plaintiff was terminated from employment with Defendant in clear violation and breach of the Service Club 10-Year Employee Program.

COUNT I

BREACH OF CONTRACT

31.

Plaintiff has informed Defendant Motorola of its violations of the Service Club 10-Year Employee Program in that it cannot terminate Plaintiff in the manner outlined above, but Defendant Motorola persists in its violation of the contract and has terminated Plaintiff.

WHEREFORE, Plaintiff prays for damages against the Defendant in Count I of this Complaint in the amount of $1,500,000.00; plus, all court costs for this proceeding.

COUNT II
UNJUST ENRICHMENT

32.

The allegations set forth hereinabove in paragraphs 1 through 31 are incorporated herein by the specific reference as if fully set forth and are therefore re-pled and re-alleged.

33.

The Plaintiff was engaged by the Defendant under false pretences for duties here in Marietta and in addition to those duties he maintained via his work throughout the United States and compensation tied to national sales performance.

34.

Pursuant to the terms and actions of Plaintiff's employment contract whether it is implied or written, and as contemplated by said agreement, Plaintiff at all times relevant to this matter, devoted his full time and best efforts to the business of the Defendant including without limitations to monitoring and working for the Defendant.

35.

As a direct result of Plaintiff's best efforts, the Defendant has been profitable, has been able to expand, has been able to maintain relationships with key clients and the Plaintiff, in all respects, has performed his obligations under his agreement with the Defendant.

36.

Defendants continued pattern of deception and conspiracy coupled with Defendants subsequent retaliatory conduct concerning Plaintiff's performance reviews, despite Plaintiff's best efforts as set forth hereinabove, resulted in a situation whereby such Defendant has been unjustly enriched by the benefits of Plaintiff's efforts, all to Plaintiff's detriment.

WHEREFORE, Plaintiff prays for damages against the Defendant in Count II of this Complaint in the amount of $1,500,000.00; plus, all court costs for this proceeding.

COUNT III

FRAUD AND MISREPRESENTATION

37.

The allegations set forth hereinabove in paragraphs 1 through 36 are incorporated herein by the specific reference as if fully set forth and are therefore re-pled and re-alleged.

38.

In effort to intentionally, willfully, and wantonly defraud the Plaintiff Norman A. Britting, the Defendants misrepresented facts to the Plaintiff via a repeated pattern over the years in order to induce and setup the Plaintiff to be economically ruined.

39.

At all times material hereto, the Defendants made statements, accusations and promises to the Plaintiff with knowledge that said statements were false when made.

40.

At all times material hereto, the Plaintiff relied on said representations, accepted them as true, and acted forthwith.

41.

At all times material hereto, the Plaintiff has been trapped, induced and mislead by the Defendant in order to extort and blackmail the Plaintiff, and prevent the Plaintiff from receiving further and other employment.

WHEREFORE, Plaintiff has been injured and continues to be injured as a result of the continued fraud and misrepresentation by the Defendant and as a result Plaintiff prays for damages against the Defendant in Count III in the amount of $1,500,000.00; plus, all court costs for this proceeding.

COUNT IV
CIVIL RICO

42.

The allegations set forth hereinabove in paragraphs 1 through 41 are incorporated herein by the specific reference as if fully set forth and are therefore re-pled and re-alleged.

43.

The Defendant, by and through their employees, at all times material hereto, conspired together and amongst themselves in order to extort and blackmail the Plaintiff into either accepting transfers and severance packages or being fired. Similar conspiracies have occurred in the past and will continue to incur as subsequent witnesses come forth to provide information to this court.

44.

Such conduct constitutes predicate acts of racketeering activity.

WHEREFORE Plaintiff prays that process issue and that Plaintiff be awarded $1,500,000.00 in Court IV of this Complaint.

COUNT V
CONVERSION OF PERSONAL PROPERTY

45.

The allegations set forth hereinabove in paragraphs 1 through 44 are incorporated herein by the specific reference as if fully set forth and are therefore re-pled and re-alleged.

46.

At all times material hereto, and while the Plaintiff was being set up throughout his career by a pattern of conduct consisting of continued misrepresentation with Motorola, he has performed, developed and operated unique network solutions that were designed outside of the scope of work and which epitomize Plaintiff's best efforts which made Defendant profitable.

47.

The Defendant, by and through their fraud, misrepresentation, and pattern of conduct, have conspired to allow the Plaintiff to continue performing these unique network solutions in order to deprive the Plaintiff of the economic benefit thereby making themselves profitable.

WHEREFORE, Plaintiff prays in this Count that the Defendant has converted personal property thereby owing to the Plaintiff in an amount that will be shown at the trial by a jury of his own peers.

COUNT VI

FALSE LIGHT INVASION OF PRIVACY

48.

The allegations set forth hereinabove in paragraphs 1 through 47 are incorporated herein by the specific reference as if fully set forth and are therefore re-pled and re-alleged.

49.

The Defendant, at all times material hereto, made representations

that were false and cast to the Plaintiff in a false light.

50.

Such material misrepresentations by the Defendant would be highly offensive to a reasonable person and were in fact highly offensive to the Plaintiff.

51.

Such statements were made with knowledge of its falsity or with reckless disregard as to its truth or falsity when made.

52.

Such statements were publicized by the Defendant.

53.

As a result of the Defendant action as aforesaid, the Plaintiff prays for damages against such Defendant in Count VI for false light and invasion of privacy in the amount as the jury will award, plus punitive damages to deter such Defendant from similar wrongful conduct in the future.

COUNT VII

RESPONDEAT SUPERIOR FOR INTENTIONAL TORT COMMITTED BY EMPLOYEE

54.

The allegations set forth hereinabove in paragraphs 1 through 53 are incorporated herein by the specific reference as if fully set forth and are therefore re-pled and re-alleged.

55.

The intentional torts set forth hereinabove were committed by Defendant John Doe at all times material hereto.

56.

Upon information and belief, Defendant John Doe, is a bona fide employee of Defendant Motorola and has been at all times material and relevant hereto.

57.

Upon information and belief, Defendant John Doe, was acting within the course and scope of his employment or were, in the alternative, acting within the scope of apparent authority as key management level employees of Defendant Motorola when the intentional tort set forth hereinabove were committed by such Defendant.

58.

Said acts include, but are not limited to, the separation notice, intentional infliction of emotional distress, and the performance review that was given to the Plaintiff in a retaliatory manner.

59.

As a result of the Defendant actions as aforesaid, the Plaintiff prays for damages against such Defendant in Count VII for liability under the respondeat superior for intentional torts committed by employees of the Defendant in the amount as a jury will award, plus punitive damages to deter such Defendant from similar wrongful conduct in the future.

COUNT VIII

TORTIOUS INTERFERENCE WITH CONTRACT

60.

The allegations set forth hereinabove in paragraphs 1 through 59 are incorporated herein by the specific reference as if fully set forth and are therefore re-pled and re-alleged.

61.

At all times material hereto, the Defendant tortuously interfered with perspective economic employment the Plaintiff may have had as a result of their extortion and blackmail.

62.

At all times material hereto, including but not limited to all times wherein the Defendant presented Plaintiff with an unsolicited confirmation of resignation, the Defendant has precluded Plaintiff from seeking other employment in his field of expertise and experience.

63.

It has been and will be and at all times material hereto, has been impossible for the Plaintiff to seek alternative employment based on the anticipatory and fraudulent breach conducted by the Defendant.

WHEREFORE Plaintiff prays that a jury award $1,500,000.00 for the tortuous interference with Plaintiff's contract.

COUNT IX

DEFAMATION/SLANDER

64.

The allegations set forth hereinabove at Paragraphs 1 through 63 are incorporated herein by this specific reference as if fully set forth and are therefore re-pled and re-alleged

65.

The Defendant and Defendants Jane Doe and/or John Doe made defamatory statements concerning the Plaintiff's profession and/or business in that such Defendants had communications with various third parties which communications disparaged Plaintiff's business acumen and skills thereby attributing to Plaintiff undesirable traits and/or characteristics in such a manner as to make Plaintiff seem unqualified for the business in which he has successfully operated for more than 20 years.

66.

Such statements were published to the aforementioned third parties.

67.

Such statements were patently false.

68.

The Defendant and Defendants Jane Doe and/or John Doe made such statements knowing of their falsity or acting with disregard as to their truth or falsity when communicating same to the aforementioned third parties.

As a result of the Defendant and Defendants, Jane Doe and/or John Doe's action as aforesaid, the Plaintiff prays for damages against such Defendants, jointly and severally, in Count IX for defamation/slander in the amount as a jury will award, plus punitive damages to deter such Defendants from similar wrongful conduct in the future in the amount of Five Hundred Thousand and 00/100 Dollars ($500,000).

COUNT X

VIOLATION OF AGE DISCRIMINATION IN EMPLOYMENT ACT

69.

Plaintiff hereby re-alleges and incorporates by reference as if fully set forth herein, the allegations of paragraphs 1 through 68.

70.

At all times herein mentioned, Plaintiff was an employee within the meaning of The Age Discrimination in Employment Act (29 U.S.C.A. §621) and was protected against discrimination in employment on the basis of age because Plaintiff was a member of the protected and recognized group of workers over the age of 40.

71.

At all times material hereto, Defendant Motorola, Inc., was a private employer with twenty or more employees, within the meaning of the Age Discrimination in Employment Act (29 U.S.C.A. §621), and as such was prohibited from discriminating in employment decisions on the basis of race.

72.

Plaintiff has been discriminated against by Defendant Motorola, Inc., on the basis of age in violation of the Age Discrimination in Employment Act (29 U.S.C.A. §621),by said

Defendant's demotion of Plaintiff to answering phones which constituted a severe deprivation of Plaintiff's responsibilities given his extensive training, background and experience.

73.

Plaintiff filed a timely charge of discrimination with the Equal Employment Opportunity Commission, and received notice dated December 7, 2000, of the right to sue in a federal district court permitting Plaintiff to bring this action. Said Right To Sue letter is attached hereto, marked Exhibit "A" and is incorporated herein by reference. Therefore, Plaintiff has exhausted all available and required administrative remedies.

74.

At a proximate result of Defendant Motorola, Inc.'s discrimination, Plaintiff has suffered and continues to suffer substantial losses incurred in loss of past and future earnings, bonuses, deferred compensation, and other employment benefits, plus expenses and attorney's fees incurred in attempting to obtain the damages due Plaintiff under the above-stated employment contract with Defendant Motorola, Inc., in an amount according to proof.

COUNT XI
ATTORNEY'S FEES

75.

The allegations set forth hereinabove in paragraphs 1 through 74 are incorporated herein by the specific reference as if fully set forth and are therefore re-pled and re-alleged.

76.

Pursuant to O.C.G.A. Section 13-6-11, the Defendants have been stubbornly litigious and acted in bad faith thereby making and forcing the Plaintiff to incur attorney's fees and file suit.

77.

Pursuant to O.C.G.A. Section 13-6-11, Plaintiff hereby makes a claim for attorney's fees that will be proved at the trial of this case.

COUNT XII
PUNITIVE DAMAGES

78.

The allegations set forth hereinabove in paragraphs 1 through 77 are incorporated herein by the specific reference as if fully set forth and are therefore re-pled and re-alleged.

79.

As a result of Defendant's willful, wanton, and calculated misrepresentations, anticipatory breach of contract, and pattern of deceptiveness, Plaintiff hereby makes a claim for punitive damages collectively for Counts I through XI in the amount of $10,000,000.00 in order to deter the Defendants from future conduct and harm to the public. This claim is made jointly and/or severally against all Defendants.

WHEREFORE, the Defendants, either jointly and/or severally, are liable to the Plaintiff in each Count as set forth hereinabove for all acts that have been plead in the trial of this case, and for all violations pursuant to Georgia Law as the evidence will warrant in the future.

WHEREFORE, Plaintiff prays that process issue and that he have judgment against the Defendants, either jointly and/or severally as to each Count as follows:

Count I – Plaintiff prays that process issue and that he receive $1,500,000.00 plus all court costs for this proceeding;

Count II – Plaintiff prays that process issue and that he receive $1,500,000.00 plus all court costs for this proceeding;

Count III – Plaintiff prays that process issue and that he receive $1,500,000.00 plus all court costs for this proceeding;

Count IV – Plaintiff prays that process issue and that he receive $1,500,000.00;

Count V – Plaintiff prays that process issue and that he receive an amount that will be shown at the trial by a jury of his own peers;

Count VI – Plaintiff prays that process issue and that he receive an amount as the jury will award, plus punitive damages to deter such Defendant from similar wrongful conduct in the future;

Count VII – Plaintiff prays that process issue and that he receive an amount as a jury will award plus punitive damages to deter such Defendant from similar wrongful conduct in the future;

Count VIII – Plaintiff prays that process issue and that he receive $1,500,000.00;

Count IX – Plaintiff prays that process issue and that he receive an amount as a jury will award plus punitive damages to deter such Defendants from similar wrongful conduct in the future in the amount of $500,000;

Count X – Plaintiff prays that process issue and liability be imposed upon Defendant Motorola, Inc., and that Plaintiff receive damages from said Defendant for said discriminatory acts in an amount to be determined by the enlightened conscience of a jury pursuant to the Age Discrimination in Employment Act.

Count XI – Plaintiff prays that process issue and that he receive attorney's fees that will be proved at the trial of this case;

Count XII – Plaintiff prays that process issue and that he receive $10,000,000.00 for punitive damages in order to deter the Defendant from future conduct and harm to the public.

This 31 day of January, 2001.

MULLMAN & ASSOCIATES, P.C.

BY: s/Roy Mullman
Roy Mullman
Ga. Bar No. 529277
Attorney for Plaintiff

3475 Lenox Road, NE
Suite 980
Atlanta, GA 30326
(404) 365-8800

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NORMAN A. BRITTING,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
vs.	)	FILE NO.
	)	1:01-CV-0339-WBH
MOTOROLA, INC., JOHN DOE 1-10, and ABC CORPORATION 1-10,	)	
	)	
Defendants.	)	

ANSWER AND DEFENSES OF DEFENDANT MOTOROLA, INC.

FIRST DEFENSE

Plaintiff has failed to state a claim for which relief may be granted for some or all of his claims.

SECOND DEFENSE

Plaintiff's claim under the Age Discrimination in Employment Act (ADEA) is barred at least in part by his failure to file timely charges with the Equal Employment Opportunity Commission (EEOC).

THIRD DEFENSE

All claims of age discrimination and/or retaliation which were not included in Plaintiff's EEOC charge are barred as outside the scope of his charge.

FOURTH DEFENSE

To the extend that Plaintiff's ADEA claims contained allegations not encompassed within EEOC charge, this Court lacks jurisdiction over any such allegations.

EXHIBIT 2

FIFTH DEFENSE

All actions taken by Defendant Motorola, Inc. (Motorola) with regard to Plaintiff were taken in good faith.

SIXTH DEFENSE

All actions taken by Motorola with regard to Plaintiff were taken for legitimate, nondiscriminatory and nonretaliatory reasons.

SEVENTH DEFENSE

Plaintiff unreasonably failed to avoid harm.

EIGHT DEFENSE

Plaintiff failed to mitigate his damages.

NINTH DEFENSE

Some or all of Plaintiff's state law claims are barred by the applicable statute of limitations.

TENTH DEFENSE

Plaintiff has failed sufficiently to set forth a claim for punitive damages against Motorola under either federal or state law.

ELEVENTH DEFENSE

Plaintiff's claims for punitive relief are barred, inasmuch as Plaintiff cannot show that Motorola demonstrated willful misconduct, fraud, wantonness, oppression, or the entire want of care, which would raise the presumption of indifference to consequences.

TWELTH DEFENSE

An award of punitive damages against Motorola would violate Motorola's due process rights as guaranteed by the Fourteenth Amendment to the United States Constitution.

THIRTEENTH DEFENSE

An award of punitive damages against Motorola would violate the equal protection provisions of the Fourteenth Amendment to the United States Constitution.

FOURTEENTH DEFENSE

Plaintiff's claims for damages under the ADEA are subject to the limitations imposed by 29 U.S.C. § 216.

FIFTEENTH DEFENSE

Plaintiff's claims do not arise out of any injury, which was proximately caused, by any action of Motorola.

SIXTEENTH DEFENSE

Plaintiff's claims are barred by the doctrine of failure of conditions precedent, waiver, and laches.

SEVENTEETH DEFENSE

Plaintiff's claims are barred by the doctrine of estoppel.

EIGHTEENTH DEFENSE

Plaintiff's claims for equitable relief are barred by the doctrine of unclean hands.

NINETEENTH DEFENSE

Plaintiff is the sole and proximate cause of any alleged negligence on the part of Motorola.

TWENTIETH DEFENSE

Plaintiff did not meet Motorola's standards of acceptable performance or behavior.

TWENTY-FIRST DEFENSE

Motorola was under no obligation to give preferential treatment to Plaintiff.

TWENTY-SECOND DEFENSE

Motorola is not liable for any acts committed by its employees outside the course and scope of such employee's authority.

TWENTY-THIRD DEFENSE

Motorola did not ratify any acts committed by any of its employees outside the course and scope of such employee's authority.

TWENTY-FOURTH DEFENSE

There has never been a contract for employment between Motorola and Plaintiff, who was an employee at will.

TWENTY-FIFTH DEFENSE

Plaintiff has failed to plead fraud wit sufficient particularity.

TWENTY-SIXTH DEFENSE

Any statements made by Motorola or its agents with regards to "Plaintiff's profession and/or business" were true.

TWENTY-SEVENTH DEFENSE

Plaintiff has failed to plead fraud with the requisite specificity required by Federal Rule of Civil Procedure 9(b).

TWENTY-EIGHTH DEFENSE

Motorola answers the individually numbered paragraphs of Plaintiff's Complaint as follows, paragraphs numbered to correspond with those in the Complaint:

1. Motorola admits that Plaintiff purports to bring this action under the cited statutes but denies any and all liability. Motorola admits that this Court has personal jurisdiction over it but denies that Plaintiff has asserted subject matter jurisdiction over any of his claims under state law.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. Motorola admits that Plaintiff was originally hired in Seattle and has been transferred to other locations. Motorola denies that all of these locations and transfers are "at all times material" to Plaintiff's complaint.
7. Denied.
8. Denied.
9. Denied.
10. Denied.
11. Denied.
12. Admitted.
13. Denied.
14. Denied.
15. Motorola admits that any termination package presented to Plaintiff contained an optional release of all rights under Georgia and federal law in exchange for enhanced severance benefits. Motorola denies all other allegations of Paragraph 15 of Plaintiff's Complaint.
16. Denied.
17. Denied.
18. Denied.
19. Denied.
20. No numbered Paragraph 20 exists in Plaintiff's Complaint.

21. Denied.
22. Denied.
23. Denied.
24. Admitted.
25. Denied.
26. Admitted.
27. Motorola denies the part of this Paragraph 27 referring to "all times material hereto" and admits the remainder of said Paragraph.
28. Admitted.
29. Admitted.
30. Denied.

COUNT I

31. Denied.

In response to Plaintiff's "WHEREFORE" clause following Paragraph 31, Motorola denies any liability whatsoever.

COUNT II

32. Motorola asserts and incorporates by reference its response to Paragraphs 1-31 as fully as if set forth herein.
33. Denied.
34. Denied.
35. Denied.
36. Denied.

In response to Plaintiff's "WHEREFORE" clause following Paragraph 36, Motorola denies any liability whatsoever.

COUNT III

37. Motorola asserts and incorporates by reference its response to Paragraphs 1-36 as fully as if set forth herein.
38. Denied.
39. Denied.
40. Denied.
41. Denied.

In response to Plaintiff's "WHEREFORE" clause following Paragraph 41, Motorola denies any liability whatsoever.

COUNT IV

42. Motorola asserts and incorporates by reference its response to Paragraphs 1-41 as fully as if set forth herein.
43. Denied.
44. Denied.

In response to Plaintiff's "WHEREFORE" clause following Paragraph 44, Motorola denies any liability whatsoever.

COUNT V

45. Motorola asserts and incorporates by reference its response to Paragraphs 1-44 as fully as if set forth herein.
46. Denied.
47. Denied.

In response to Plaintiff's "WHEREFORE" clause following Paragraph 47, Motorola denies any liability whatsoever.

COUNT VI

48. Motorola asserts and incorporates by reference its response to Paragraphs 1-47 as fully as if set forth herein.
49. Denied.
50. Denied.
51. Denied.
52. Denied.
53. Motorola denies any and all liability under this COUNT VI.

COUNT VII

54. Motorola asserts and incorporates by reference its responses to Paragraphs 1-53 as fully as if set forth herein.
55. Denied.
56. Denied.
57. Denied.
58. Denied.
59. Motorola denies any and all liability under this Count VII.

COUNT VIII

60. Motorola asserts and incorporates by reference its response to Paragraphs 1-59 as fully as if set forth herein.

61. Denied.

[62-73 omitted]

73. Motorola admits that Plaintiff filed a timely EEOC charge with regard to some of his allegations and filed this action timely. Motorola denies all other allegations of Paragraph 73 of Plaintiff's Complaint.

74. Denied.

COUNT XI

75. Motorola asserts and incorporates by reference its responses to Paragraph's 1-74 as fully as if set forth herein.

76. Denied.

77. Motorola admits that Plaintiff makes a claim but denies any and all liability whatsoever.

COUNT XII

78. Motorola asserts and incorporates by reference its responses to Paragraphs 1-77 as fully as if set forth herein.

79. Denied.

In response to all of Plaintiff's "WHEREFORE" clauses following Paragraph 79, Motorola denies any liability whatsoever.

80. Motorola denies all other and further allegations of Plaintiff, which it has not specifically admitted herein.

WHEREFORE, Motorola respectfully prays this Court to dismiss all of Plaintiff's claims and enter judgment in its behalf and against Plaintiff in all respects, and for such other and further relief as justice may require.

COUNTERCLAIM

COMES NOW Defendant Motorola and makes this, its counterclaim, against Plaintiff.

1. Plaintiff has subjected himself to the jurisdiction of this Court.
2. Plaintiff has willfully failed to return to Motorola certain items which are the property of Motorola and has therefore tortiously converted such property to his own use.

WHEREFORE, Motorola respectfully prays this Court:

(a) to order Plaintiff to return all such property immediately to Motorola, or, in the alternative, to compensate Motorola for its loss;

(b) to award to Motorola and against Plaintiff its costs and a reasonable attorneys fee for having to bring this Counterclaim;

(c) for such other and further relief as justice requires.

Respectfully submitted,

HOLLAND & KNIGHT, LLP
S/Mary Ann B. Oakley
Mary Ann B. Oakley
Georgia Bar No. 548187
Rachel C. Boring
Georgia Bar No. 065133

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(404) 881-0470(fax)

ATTORNEYS FOR MOTOROLA, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NORMAN A. BRITTING,	: Filed in Clerk's Office
	: U.S.D.C. Atlanta
Plaintiff,	: August 13, 2001
	: Luther D. Thomas, Clerk
vs.	: By: s/SH
	: Deputy Clerk
	:
	: CIVIL ACTION NO.
	: 1:01-CV-0339-WBH
MOTOROLA, INC., et al.,	:
	:
Defendants.	:

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COMES NOW NORMAN A. BRITTING, Plaintiff, by and through undersigned counsel and tenders Plaintiff's Motion for Summary Judgment and shows the Honorable Court as follows:

Pertinent Factual Background

Plaintiff was hired by Motorola, Inc. (hereinafter referred to as "Defendant"), in January, 1982. While Plaintiff was initially employed by the Defendant in Seattle, Washington, the Plaintiff was transferred to several other employment locations of the Defendant's business locations and at the time of Plaintiff's employment termination he was employed by the Defendant at 2121 Newmarket Parkway, Suite 130, Marietta, Georgia, as a Consulting Systems Engineer for the Motorola Information Systems Group.

EXHIBIT 3

In early 1996, while the Plaintiff was employed with the Defendant at its Mansfield, Massachusetts facility, he was approached by his superiors and provided two choices. The first choice was employment termination and the second choice, which the Plaintiff accepted, under duress via the aforementioned threats of employment termination, was for the Plaintiff to be transferred to Marietta, Georgia facility under the false presentation that the transfer was pursuant to the terms of the Senior Service Club 10-Year Employee Program.

At all material times, the Plaintiff employment functions at and while employment facility in his position as a Consulting Systems Engineer for the Motorola Information Systems Group (hereinafter referred to as the "MISG") and performance was performed at or above the requirements of his employment position.

Without any prior notice, on June 10, 1999, the Plaintiff was summoned into a meeting and advised that his "resignation" was accepted. The only problem being that the Plaintiff had not tendered any such claimed "resignation" notification, notice or otherwise to Defendant Motorola, the work facility or his superiors whatsoever. See Exhibit "A" as attached hereto.

Plaintiff was advised, pursuant to the Plaintiff's Service Club 10-Year Employee Program (hereinafter referred to as the "SC10EP"), that the Plaintiff had twenty-one (21) days in which to find new employment within the Motorola employment field. Plaintiff was presented a termination package.

On July 15, 1999, Defendant's authorized agent, one Dave Gowen, traveled from Dallas to the Marietta facility where the Plaintiff was working and met with the Plaintiff and requested that the Plaintiff execute the termination package documents. Plaintiff's review of the termination package documents included a release that the Plaintiff would relinquish and/or make no claims pursuant to any federal or state law rights.

When the Plaintiff advanced that he was disinclined to waive both federal and state rights, Mr. Gowen, advised the Plaintiff that he would be given an additional ninety (90) days in which to locate other employment within Motorola and be accepted by that division or department. While the aforementioned offer was advanced, the Defendant's employees embarked upon a course of conduct which ensured that the Plaintiff would not be able to find alternative employment within the company. That course of conduct ensuring that the Plaintiff would not find alternative employment within Motorola commenced with providing false performance review statements which was reflected in the Plaintiff's annual performance review evaluation report. When these records were reviewed by other divisions within Motorola, the Plaintiff was logically not considered for any of the positions which the Plaintiff applied for.

On August 15, 2000, the Plaintiff, as an engineer, was demoted to a position of answering phones while two similarly-situated employees were allowed to remain in their positions, while younger, being paid less and given the Plaintiff's employment responsibilities. Plaintiff was never informed of any basis, in fact or otherwise for the instant demotion. Plaintiff refused to allow the instant retaliatory demotion to result in his voluntary self termination.

Once again, on January 4, 2001, Plaintiff was ordered into a meeting with John Chevry, an authorized agent for Defendant Motorola pursuant to the Defendant's continuing intention to involuntarily terminate the Plaintiff. A second meeting was held on January 5, 2001, in which, for a second time, the Defendant's agents informed the Plaintiff of the specifics of the involuntary separation package which the Defendants had wanted the Plaintiff to agree to. Plaintiff was thereinafter given the involuntary separation package.

On January 26, 2001, the Plaintiff was terminated from his employment with the Defendant in violation and breach of the Service Club 10-Year Employee Program. Plaintiff filed with the U.S. Equal Employment Opportunity Commission ("EEOC") and received a notice dated December 7, 2000, of the Plaintiff's right to sue. After receipt of the EEOC right to sue letter, the above-styled cause of action was filed.

II. Georgia's Right to Work Laws are Not Applicable to the Case at Bar

The State of Georgia is a right to work state, which equates to the right of an employer to terminate an employee with, or without cause. Unless there is a signed employment contract, an employee does not have a right to challenge the employer's termination other than for worker's compensation or unemployment benefits unless there has been employment discrimination which first must be addressed the U.S. Equal Employment Opportunity Commission ("EEOC"), prior to bring suit. **Sheet Metal Workers International Association v. Carter**, 133 Ga. App. 872 (1975); **Evans v. Bibb Co.**, 342 S.E.2d 484 (Ga. Ct. App. 1986).

The law in Georgia now states that an "employer, with or without cause and regardless of its motives may discharge the employee without liability."[Cits.]" **Troy v. Interfinancial**, 171 Ga. App. 763, 766 (1) (320 S.E.2d 872) (1984). See **Borden v. Johnson**, 196 Ga. App. 288-89 (1990). However the Plaintiff does not and has never fallen prey to Georgia presently archaic employment laws under the facts of the case. Plaintiff's employment with Defendant Motorola commenced outside the State of Georgia and therefore Georgia's archaic employment laws are not applicable to the case at bar.

III. The Plaintiff's "Senior Service" Contractual Rights

Having established that the Plaintiff's employment falls outside the legal perimeters of Georgia's employment "at will" laws, Plaintiff advances that the Plaintiff was contractually protected pursuant to his employment under the Senior Service Club 10-Year Employee Program.

Defendant Motorola, Pursuant to Policy #7: Respect for Senior Service, has instituted the following Human Resources Policy:

> Motorolans who have a record of long service with the company have earned respect. Recognition and certain special considerations. We rely on long-service employees to be role models and mentors in the Motorola culture and, therefore, expect them to maintain performance and contributions at a level that others will regard as exemplary.
>
> .....
>
> Employees with unbroken long service (based on service date) are provided with special considerations when certain employment decisions are made:
>
> Special approval levels are required prior to the downgrade or reduction in salary of an employee with a service date of 10 or more years. These approval requirements are outlined in Policy # 10 – Compensation Approvals.

Prior approval of the chairman and chief executive officer is required for the termination or layoff of any employee with 10 or more years of service (based on service date). Employees may be nonscheduled, with or without pay, during the time required approvals will normally result in a Class III infraction for the manager or supervisor and the responsible human resource representative.

Employees with 10 or more years of service (based on service date), whose performance had dropped below the acceptable level, may be terminated for poor performance with the prior approval of the chairman and chief executive officer. Approval requirements are:

- At least two written documentations within the past 12 months.
- One of these documents should be a performance improvement plan with specific performance expectations, measurement dates and indication that the employee may be subject to termination if performance does not improve.
- A reasonable period of time (normally 3 to 6 months) following the performance improved performance.
- A final performance improvement plan.

4. ***Employees with a service of 10 or more years will not be involuntarily laid off.*** They may volunteer for layoff, but are not guaranteed a recall. Volunteers refusing a reasonable offer to return to active status may be terminated from layoff.

5. Employees with a service date of 10 or more years will not be subject to involuntary separation due to the closing of a facility or elimination of jobs, without documented evidence that reasonable efforts have been made to identify and reassign them to other jobs for which they are qualified. Employees may be subject to involuntary separation due to the sale of an operation when the employee transfer is part of the sales contract. Prior chief executive officer approval is required in these cases.

6. If an employee with a service of 10 or more years wishes to volunteer for a permanent reduction in force, the sector/group general manager and the director of human resources may approve the separation after interviewing the employee. In addition, a volunteer with a service of 25 or more years requires prior approval of the chief executive officer.

Policy # 7: Respect for Senior Service (Emphasis Added).
See Exhibit "B" as attached hereto.

Thus, the presentation of the ***voluntary*** resignation documents, not authored by the Plaintiff constitutes fraud by the applicable individuals of Defendant Motorola.
Thus, the Defendant's authorized agents fraudulently created a resignation document and on June 10, 1999, thereinafter demanded that the Plaintiff sign the same ***as if the Plaintiff had authored or originated that document.*** Again, on July 15, 1999, Defendant Motorola's authorized agent Dave Gowen, traveled from Dallas to Georgia and again attempted to intimidate the Plaintiff into signing the termination/resignation package and when the Plaintiff refused to concede to the second fraudulent attempt, stated that the Plaintiff would be allowed an additional 90 days to find employment within Motorola.

Likewise, the Plaintiff's job demotion by Defendant Motorola was clearly and absolutely against the instant policy which occurred on August 15, 2000. Two younger individuals assumed the Plaintiff's position while the Plaintiff was delegated to answering telephones. [1]

On January 4, 2001, Plaintiff was informed that he was attend a personal meeting with John Chevry, to now discuss the Plaintiff's pending involuntary termination without absolutely any prior knowledge being given. On July 5, 2001, the Plaintiff attended that meeting with Mr. Chevry. At that hearing the Plaintiff was provided with an involuntary separation package, which breached the Policy #7: Respect for Senior Service requirements and procedures.

On January 26, 2001, Plaintiff was terminated from his employment with Defendant Motorola.

IV. Breach of Plaintiff's Implied Employment Contractual Rights

It is Plaintiff's position that the Plaintiff's employment was protected pursuant to policy and procedures which clearly stated the employment rights of employees who worked for Defendant Motorola for more than ten (10) years were granted special status within the company in relationship to other employees who had not worked for Defendant Motorola for ten or more years.

---

[1] Plaintiff's demotion to answering telephone phones continued until his termination on January 26, 2001.

Defendant Motorola, via its employment policies have clearly provided the Plaintiff with protected employment rights which absolutely equates to an **"implied contract"** based upon various Motorola policies and procedures that absolutely provided for protection against the very thing that has taken place in the instant case. Hence, it is Plaintiff's position that the Plaintiff's numerous years of employment with Defendant Motorola have **"created a situation 'instinct' with obligations."**

The Eleventh Circuit Court of Appeals in **Martin v. Baer, 928 F.2d 1067 (11th Cir. 1991)**, came across similar claims in a case out of Florida. While the Martin Court did not, under the circumstances of that case, find an implied contract relating to protections against false sexual harassment claims, the Court nevertheless recognized the reality of such claims may be advanced. **Toussaint v. Blue Cross & Blue Shield**, 408 Mich. 579, 292 N.W.2d 880 (1980)(holding that explicit policy manual provisions and oral representations by employers sometimes can create "special circumstances" justifying an exception to the usual presumption of at-will employment). The reason that the Martin Court did not find the instant company policy applicable to him because **". . . he [was] *not* the *primary beneficiary* of the policy."**

In the case at bar, Policy #7 was ***specifically written to protect the Plaintiff and other employees who had worked for Motorola for more than ten years.***

Furthermore, pursuant to Section 3., of Policy #7, it is absolutely and unrefutable that Defendant Motorola wilfully did not comply with the terminations provisions as required dealing with the Plaintiff's recognized tenured employment status. Absolutely nothing in any of the documents, relating to the Plaintiff's termination shows that it was "... ***with the approval of the chairman and chief executive officer***" **as mandated** pursuant to absolutely crystal clear terms of the instant policy. Likewise, and furthermore, the record is absolutely devoid, upon the part of Defendant Motorola, that Defendant Motorola invoked, used or utilized any of the four (4) subparagraphs required to be performed, prior to the Plaintiff's termination.

Defendant Motorola, and its authorized agents, not only violated the specific conditions of Policy #7, they did it acting outside the legal perimeters of the Plaintiff's stated rights under that policy.

V. Defendant Motorola's Fraudulent Conduct

Plaintiff advances, notwithstanding Plaintiff's other claims, that Defendant Motorola committed a fraud against the Plaintiff by the fraudulent creation of the resignation documents created prior to June 10, 1999, and thereinafter tendered to the Plaintiff to sign on June 10, 1999.

It is Plaintiff's position that the creation of the fraudulent resignation documents and the tendering of the same to the Plaintiff and thereinafter continuing their demands that the Plaintiff terminate his employment via the fraudulent resignation documents must be absolutely drawn in the legal sands against Defendant Motorola.

The essential elements of an action for fraud and deceit are: (1) that the Defendant made the representations; (2) that at the time the Defendant knew they were false; (3) that the Defendant made them with the intention and purposes to commit the fraud; (4) that the Plaintiff reasonably relief upon such representations, and; (5) that the Plaintiff sustained the alleged loss and damage as the approximate cause of the Defendant's conduct. **Brown v. Ragsdale Motor Co.**, 65 Ga. App. 727 (1941); **Cosby v. Asher**, 74 Ga. App. 884 (1947).

When Defendant Motorola presented the fraudulent resignation documents, stating that the Defendant had agreed to the same, the Plaintiff exercised his rights and refused to sign the same. However, the Defendant continued to demand and commit further acts and actions against the Plaintiff because he refused to become a party to the Defendant's fraudulent efforts to terminate him. See **Daniel v. Dalton News Co.**, 48 Ga. App. 772 (1934).

When Defendant Motorola's authorized agents fraudulently created documents and thereinafter continued their fraudulent conduct with further fraudulent documents and claims, within those documents, the Plaintiff has a cause of action for fraud. The gist of the Plaintiff's fraud claims against Defendant Motorola rests upon the fraudulent creation of the resignation documents and the deceitful and fraudulent employment reviews and reports, which were fraudulently utilized for the fraudulent purposes of fraudulently terminating the Plaintiff's employment. **Dundee Land Co. v. Simmons**, 204 Ga. 248 (1948). In other words, Defendant Motorola created false employment records relating to the Plaintiff as a basis to terminate him. **Hertz Corp v. Cox**, 430 F.2d 1365 (5th Cir. 1970), cert. denied, 414 U.S. 825 (1973).

The Georgia Court of Appeals in **Grainger v. Jackson**, 122 Ga. App. 123 (1970) has stated that fraud is "in itself subtle," and circumstances apparently trivial or almost inconclusive, if separately considered, may by their number and joint operation be sufficient to constitute conclusive proof.

It is Plaintiff's position that the issue of fraud is more than sufficient to have the Honorable Court grant summary judgment as to that legal issue.

VI. Age Discrimination

While the Plaintiff has advanced an age discrimination count in the above-styled cause of action pursuant to the Federal Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., as amended ("ADEA"), this motion is not addressing that issue at this time.

Plaintiff believes that the evidence of age discrimination is and will be sufficient to entitle the Plaintiff to recover against Defendant Motorola, however, it is Plaintiff's present legal position to attain a legal judgment as to liability dealing with the Defendant's breach of the Plaintiff's employment rights at this stage of the litigation and attack the issue of age discrimination further down the legal road. It is Plaintiff's position that the trial of this issue, along with the testimony of live witness will clearly and absolutely legally cement the case against Defendant Motorola under the totality of the facts of the case as to that issue. Thus, Plaintiff's age discrimination claims are not being advanced within this motion.

VII. Plaintiff is Entitled to Summary Judgment

"Summary judgment is proper if the pleadings, depositions, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." **Pritchard v. Southern Co. Servs.**, 92 F.3d 1130, 1132 (11th Cir. 1996). See also **Lowe v. Alabama Power Company**, ___ F.3d ___ (11th Cir. 2001).

In the case at bar, Defendant Motorola, via its authorized agent, fraudulently created a resignation document, and had it approved without the Plaintiff's knowledge, authorization or approval whatsoever. Likewise, Defendant Motorola, thereinafter continued its fraudulent conduct by fabricating false employment records falsely reflecting the Plaintiff's job performance, and finally, without according the Plaintiff his rights, pursuant to Policy #7, terminated him and cheated him out of the thousand of dollars he would have received but for their conduct.

Defendant Motorola, did the foregoing so as to allow a younger employee to assume his job position and responsibilities while paying those younger employees thousands of dollars less each month than what was being paid to the Plaintiff.

Conclusion

It is Plaintiff's position that the Plaintiff, at this stage of the litigation has advanced sufficient evidence and facts which entitle the Plaintiff to a grant of summary judgment as to the issues of an implied employment agreement and fraud and respectfully moves for the Honorable Court to grant the same.

Respectfully submitted,

S/ Roy Mullman
ROY MULLMAN, ESQ.
Attorney for Plaintiff
Georgia Bar No. 527299

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Atlanta, GA 30326
(404) 365-8800

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NORMAN A. BRITTING,	:	
	:	
Plaintiff,	:	
	:	
vs	:	CIVIL ACTION NO.
	:	1:01-CV-0339-WBH
MOTOROLA, INC., et al.,	:	
	:	
Defendants.	:	

Certificate of Service

I hereby certify that I have this day served a true and accurate copy of the foregoing **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, MATERIAL FACTS TO WHICH PLAINTIFF CLAIMS THERE IS A DISPUTE**, by placing a copy of the same into an envelope with sufficient postage to ensure delivery and placing the same into the United States Mail addressed to Mary Ann B. Oakley, Esquire, Holland & Knight, LLP., Attorneys for for Defendants, Suite 2000, One Atlantic Center, 1201 West Peachtree Street, N.E., Atlanta, GA 30309, on this 10th day of August, 2001.

S/ Roy Mullman
Roy Mullman

Mullman & Associates, P.C.
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3475 Lenox Road, N.E.
Atlanta, GA 30326
(404) 365-8800

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NORMAN A. BRITTING,	: Filed In Clerk's Office
	: U.S.D.C. Atlanta
Plaintiff,	: August 13, 2001
	: Luther Thomas, Clerk
	: By: S/RH
	: Deputy Clerk
vs.	: CIVIL ACTION NO.
	: 1:01-CV-0339-WBH
MOTOROLA, INC., et al.	:
	:
Defendants.	:

MATERIAL FACTS TO WHICH THERE IS NO DISPUTE

COMES NOW NORMAN A. BRITTING, Plaintiff, by and through undersigned counsel and tenders the following Material Facts to Which There is No Dispute and shows the Honorable Court as follows:

I.

Plaintiff was hired by Defendant Motorola in 1982, in Seattle, Washington.

II.

Plaintiff was hired by Defendant Motorola in the position of a Consulting Systems Engineer for the Motorola Information Systems Group at all pertinent times.

III.

In 1996, Defendant was transferred to Mansfield, Massachusetts and commenced working at that facility as a consulting systems engineer.

EXHIBIT 4

IV.

While employed in Mansfield, Massachusetts, for Defendant Motorola, as a consulting systems engineer, the Plaintiff was given two options of: (1) employment termination, or; (2) transfer to Marietta, Georgia and accept employment with that facility. This was done in violation of Policy #7, rights as granted pursuant to company policy.

V.

Plaintiff accepted the transfer to the Marietta facility and commenced working for the same.

VI.

On June 10, 1999, Plaintiff was presented with fraudulent resignation documents, which Defendant Motorola claimed that had been tendered by the Plaintiff.

VII.

Defendant Motorola entered false and fraudulent employee reports into the Plaintiff's employment file to be used as a fraudulent basis to terminate the Plantiff.

VIII.

Plaintiff's duties were assigned to younger employees and Plaintiff's was assigned the job assignment of answering telephones for the Defendant.

IX.

On January 5, 2001, Plaintiff was required to attend a meeting with John Chevry, an authorized agent for Defendant Motorola and informed that the Plaintiff was being involuntarily separated from the Plaintiff's employment.

X.

Plaintiff was not accorded Plaintiff's rights pursuant to Policy #7 in that the Plaintiff was terminated in wilful violation of the stated policy and employment rights as granted to the Plaintiff.

XI.

On January 26, 2001, Plaintiff's employment with Defendant Motorola was terminated.

Respectfully submitted,

S/Roy Mullman
ROY MULLMAN, ESQ.
Attorney for Plaintiff
Georgia Bar No. 527299

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Filed in Clerk's Office
U.S.D.C. Atlanta
March 7, 2002
Luther D. Thomas,
Clerk
By: s/JSM
Deputy Clerk

NORMAN BRITTING,	:	
	:	
Plaintiff,	:	CIVIL ACRTION FILE
	:	NO. 1:01-CV-0339-WBH
v.	:	
	:	
MOTOROLA, INC., JOHN DOE 1-10, and ABC CORPORATION 1-10,	:	
	:	
	:	
Defendants.	:	

ORDER

Before the Court are Defendant Motorola, Inc's ("Motorola") motion for sanctions [9], Plaintiff Norman Britting's motion for leave to file response out of time to Motorola's motion for sanctions [13], Mr. Britting's motion for summary judgment [15], Motorola's motion for summary judgment [17] and Motorola's motion for default judgment on its counterclaim against Mr. Britting [25].

EXHIBIT 5

I. BACKGROUND

Mr. Britting worked at Motorola for approximately nineteen years, from 1982 to 2001.[1] In 1982, Mr. Britting began working as an engineer for a subsidiary of Motorola, Codex Corporation, in Bellevue, Washington. In 1989, Mr. Britting held the position of Manager of International Applications Engineering in the Motorola facility located in Mansfield, Massachusetts. From 1994 to 1996, Mr. Britting worked at Telco, a sales entity dedicated to selling Motorola products. At Telco, Mr. Britting assisted in the business of selling Motorola products to telephone infrastructure industry.

In 1996, Mr. Britting's position at Telco was abolished. Therefore, Motorola presented Mr. Britting with a choice – termination or a transfer to the Marietta, Georgia Motorola facility (the "Georgia facility"). Mr. Britting chose to be transferred, though he now claims that this transfer offer was made under false pretenses[2] and he only agreed to transfer due the fear of losing his job. At the Georgia facility, MR. Britting held the position of systems engineer in the Motorola Information Systems Group ("MISG"). IN that position, Mr. Britting was responsible for "network design and product analysis for end-user customers in the sales organization." Motorola's Statement of Uncontested Facts, p.2 ¶4.

Motorola argues that when Mr. Britting was transferred to the Georgia facility, he acted in a remote manner toward his fellow employees and contributed very little as a systems engineer. Jon Cheverere, Mr. Britting's supervisor, gave Mr. Britting an

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[1] As an employee who worked at Motorola for over ten years, Mr. Britting was a member of the Senior Service Club Ten-Year Employee Program (the "Service Program"). Mr. Britting alleges that Motorola breached the Service Program "contract" by firing him.

[2] Mr. Britting claims that Motorola offered him a transfer to the Georgia facility under the "false pretenses." BY "false pretenses" Mr. Britting insinuates that Motorola was operating under the impression that he would not chose to transfer. Therefore, Mr. Britting believes that Motorola offered the transfer with the knowledge that he would probably not accept it. Britting Dep., p. 44.

ultimatum: begin being productive as a systems engineer or be replaced. Mr. Britting began to be productive.

In 1999, Motorola reduced its work force because the Multi-Service Networks Division was losing money. Motorola offered those Motorola employees, whose jobs were being abolished, including Mr. Britting, a voluntary separation agreement, which most employees accepted. Motorola contends that these voluntary separation agreements were offered to three categories of employees: (1) those expressing interest in retirement; (2) those located at Motorola facilities in which business was dwindling; and (3) those performing job functions that were currently being performed by more persons than business demands required. See id. At 4, ¶12. Motorola argues that Mr. Britting was part of the third listed category of employees. Three systems engineers held this position at the Georgia facility at that time and Motorola decided to reduce that number. Additionally, MR. Britting was the lowest ranking employee of the three.

Therefore, Dave Gowen, a Motorola representative, informed Mr. Britting that his position was being abolished due to a reduction in work force and, at the same time, offered him the voluntary separation. Motorola gave Mr. Britting twenty-one (21) days to decide whether to sign the voluntary separation agreement. These agreements confirmed the voluntary resignation of the employees effective July 16, 19999 and Motorola's acceptance of the resignation. During Mr. Gowen's meeting with Mr. Britting, Mr. Britting was informed, as were all of the other employees losing their jobs, that he had ninety days in which to find another job within Motorola of his company property would be collected on July 15, 1999.

Mr. Britting never signed this agreement. When Mr. Britting refused to sign the agreement, Motorola removed the entire offer from the table. Mr. Britting was then informed that there would likely be no other Motorola jobs available to him at other Motorola locations because those employees who accepted the voluntary separation agreement would get priority in the re-locations process. In the next few weeks, however, Motorola re-instated several positions that were originally to be abolished because enough employees signed the voluntary separation agreement to significantly reduce the Motorola work force. As a result, Mr.

Britting's position was restored. Therefore, sixty days into the ninety-day period in which Mr. Britting was instructed to look for another job within Motorola, his old position as a systems engineer at the Georgia facility was restored. Mr. Britting alleges that due to this limbo period, he lost certain bonus money. Motorola claims that as soon as Mr. Britting's job was restored he again became unproductive, publicized that he was suing Motorola for a lot of money and that he would be leaving the company. Motorola contends that as a result of this behavior and the fact that he claimed he was leaving, sales people no longer wanted to work with him.

In 2000, Mr. Gowen reviewed Mr. Britting's performance for the year of 1999. Mr. Gowen and Bob Dannheim, Mr. Britting's supervisor for most of 1999, planned to give MR. Britting a "needs improvement" rating at his evaluation. This rating was due to the fact that MR. Britting rated at the bottom of his group consistently throughout 1999 and received the lowest salary increase of all systems engineers under Mr. Dannheim's direct or indirect supervision. Mr. Britting complained to Mr. Gowen and Mr. Dannheim that his poor performance was caused largely by the uncertainty of his near job loss in 1999. Mr. Cheverere and Mr. Gowen accepted Mr. Britting's explanation, informed Human Resources of Mr. Britting's explanation and, accordingly, Mr. Britting received a better evaluative rating and a bonus. Motorola argues that from this point on, Mr. Britting never became a productive worker again.

In 2000, Bill Beltz, the leader of Motorola's program for 800-line technical assistance, assigned three employees, each to a different time zone within the United States, to provide technical assistance to the 800-line sales force. Motorola created these positions so the 800-line sales force could concentrate on drumming up new business rather than answering technical questions. Motorola maintains that these three employees were chosen due to their experience levels and their locations. Mr. Britting was one of three technical people assigned the 800-line, the only one in the eastern standard time zone. Upon being re-assigned, Mr. Britting's base salary and position level remained the same. However, Mr. Britting maintained that the new job was an affront to his dignity

and he disliked his new daily tasks, including sitting in front of a computer and answering phones.

Between late 2000 and second quarter of 2001, Motorola reduced its work force by 26,000 employees and instituted a hiring freeze. At that time, Motorola made efforts to help these employees get jobs in other departments at Motorola by setting up interviews. Mr. Britting had several interviews, but was not selected due either to lack of necessary skill or the hiring freeze. While other people were hired at some of the jobs Mr. Britting interviewed for, Motorola maintains that those choices were based on location, personality and skill sets.

Additionally, Mr. Britting bad-mouthed his managers and his division at some of his interviews, causing interviewers to believe he was not a team player. Nonetheless, because Mr. Britting was having trouble finding another job within Motorola, Motorola extended his termination date until early 2001, but expressed to Mr. Britting, and other similarity situated employees, that it was unlikely that Motorola jobs would be available due to the hiring freeze. When contacted by Cynthia Johnson from Human Resources, Mr. Britting yelled at her about the treatment he was receiving fro Motorola.

At the end of the prescribed period, Mr. Britting still did not have another job within Motorola. Permission was obtained from Glenn Geiko, Senior Vice President of Human Resources, to terminate Mr. Britting, pursuant to the guidelines for eliminating the job of an employee who is part of the Service Program. Mr. Britting's job was eliminated and his employment was terminated. Currently, only one employee acts as a systems engineer giving technical support to the 800-line, as opposed to the three that were initially assigned to the post.

Mr. Britting filed his complaint on February 5, 2001 asserting ten claims against Motorola stemming from his transfer to the 800-line and his eventual termination. Motorola answered and filed a counterclaim requesting the return of company property currently being held by Mr. Britting. Currently before the Court are cross motions for summary judgment, a motion for sanctions and a motion for default judgment.

II. DISCUSSION

A. Motorola's Motion for Sanctions[3]

Motorola moves for sanctions due to Mr. Britting's failure to appear at his scheduled April 24, 2001 deposition. Mr. Britting's counsel, Roy Mullman, left a voice mail for Motorola's counsel, Mary Ann B. Oakley, at 2:04pm on April 23, 2001, the afternoon prior to the scheduled deposition, informing her of an unexpected schedule conflict involving a court appearance in Douglas County at the same time as the scheduled deposition. Due to her own schedule on April 23, 2001, Ms. Oakley did not receive Mr. Mull man's voice mail until 5:30pm that day. Because of his need to prepare for the Douglas County court appearance, Mr. Mullman was forced to cancel his meeting with Mr. Britting, scheduled to take place in the afternoon of April 23, 2001, in which he planned to prepare his client to be deposed.

Ms. Oakley was unable to contact Mr. Mullman after she received the message to confirm that the deposition was actually cancelled. Therefore, she appeared at Mr. Mull man's office the next day at the scheduled time in order to place the cancellation on the record. Ms. Oakley reports that Mr. Mullman was in his office, not in court in Douglas County, and was not dressed appropriately for a court appearance. Mr. Mullman explains that late in the afternoon of April 23, 2001, the Douglas County case was dismissed. However, he was unable to re-schedule Mr. Britting's preparation time prior to his deposition, and was also unsure until early in morning on April 24, 2001, whether he was required to appear in Douglas County to announce the dismissal on the record. Therefore, Mr. Mullman chose not to contact Ms. Oakley to re-schedule the deposition for the same time. However, the parties were able to re-schedule Mr. Britting's deposition for several weeks later.

Motorola moves for sanctions of dismissal and reasonable expenses pursuant to Federal Rule of Civil Procedure 37(d), including the cost of the court reporter, $102.25, and Ms. Oakley's hourly rate of $355 for 2.7 hours, totaling $1,060.75. In its discretion,

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[3] Mr. Britting motion for leave to file his response to Motorola's motion for sanction is granted as unopposed. Therefore, the Court has reviewed Mr. Britting's response in consideration of this motion.

the Court declines to dismiss the case and also declines to require Mr. Britting to pay Ms. Oakley's fee since advance notice of the deposition's cancellation was given, however late in the preceding day, and the parties were able to re-schedule the deposition with ease. However, the Court orders Mr. Britting to pay half of the court reporter fee incurred due to the canceled deposition. Therefore, Mr. Britting is ordered to pay Motorola the amount of $51.12 within ten (10) days of the date of this Order.

B. Cross Motions for Summary Judgment

Mr. Britting alleges that following ten claims against Motorola: (1) demotion in violation of the Age Discrimination in Employment Act ("ADEA"), 28 U.S.C. § 621 et seq; (2) job elimination in violation of the ADEA; (3) breach of the Service Program contract; (4) unjust enrichment; (5) fraud/misrepresentation; (6) conversion of personal property; (7) false light invasion of privacy; (8) respondent superior for intentional torts committed by employees (John Does 1-10 and ABC Corporations 1-10); (9) tortious interference with contract; and (10) defamation in the form of slander. Mr. Britting seeks the following relief; (1) attorney's fees and costs; (2) punitive damages; and (3) actual damages. Mr. Britting moves for summary judgment with regard to only his breach of contract and fraud/misrepresentation claims. Motorola opposes Mr. Britting's motion and moves for summary judgment on all claims.

1. Summary Judgment Standard

Federal Rule of Civil Procedure 56 provides that summary judgment is appropriate when "the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56©. A fact is material if, under applicable substantive law, it might affect the outcome of the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L. Ed.2d 202 (1986); Tipton v. Bergrohr GMBH-Siegen, 965 F.2d 994, 998 (11th Cir. 1992), cert. denied, 507 U.S. 911, 113 S.Ct.

1259, 122 L.Ed.2d 657 (1993). "It is genuine if the record taken as a whole could lead a rational truer of fact to find for the nonmoving party." Tipton, 965 F.2d. at 998 (internal quotation marks omitted). Thus, the court's focus in ruling on a motion for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. At 251, 106 S.Ct.2505; see also Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997).

Where the nonmoving party bears the burden of proof at trial, the moving party must demonstrate to the court that "there is an absence of evidence to support the nonmoving party's case," Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548 (1986), or must put forth affirmative evidence negating an element of the nonmoving party's case, Fitzpatrick v. Atlanta, 2 F.3d 1112, 1116 (11th Cir. 1993). It is then the responsibility of the nonmoving party, by revealing evidence outside of the pleadings, to show that evidence supporting its case does exist or that the element sought to be negated remains a genuine issue of material fact to be tried. Id. Essentially, this requires the nonmoving party to come forward with evidence sufficient to withstand a directed verdict on this issue at trial. Id. At 1116-7.

The nonmoving party is not required to carry its burden of proof at the summary judgment stage. In analyzing the motion, the Court views the facts in the light most favorable to the nonmoving party and makes all factual inferences in favor of that party. Hairston v. Gainesville Sun Publishing Co., 9 F3d 913, 918 (11th Cir. 1993); Rollins v. TechSought, Inc., 833 F.2d 1525 (11th Cir. 1997). "The court must avoid weighing conflicting evidence or making credibility determinations." Hairston, at 919. "Where a reasonable fact finder may 'draw more than one inference from the facts, and that inference creates a genuine issue of material fact, then the court should refuse to grant summary judgment.'" Id. (quoting Barfied v. Brierton, 833 F.2d 923, 933-34 (11th Cir. 1989)).

2. Mr. Britting's ADEA Claims

Mr. Britting was fifty-two years old when he lost his job in Motorola. Mr. Britting alleges that Motorola discriminated against him in two ways based on his age: (a) by "demoting" him to the

800-line; and (b) by eliminating the position he held at the 800-line. Because Mr. Britting relies on circumstantial evidence to present his case, the Court must engage in the traditional burden shifting analysis set forth in McDonnell Douglas Corp. V. Green, 411 U.S. 792, 93, S.Ct. 1817, 36 L.Ed.2d 668 (1973), when analyzing Mr. Britting's ADEA claims. Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1432 (11th Cir. 1998)(the McDonnell Douglas framework is applicable in ADEA cases). Additionally, the Eleventh Circuit "typically appl[ies] legal standards developed in Title VII and ADEA cases interchangeably." Pennignton v. City of Huntsville, 261 F.3d 1262, 1269 (11th Cir. 2001)(citing Chapman v. AI Transport, 229 F.3d 1012, 1024 (11th Cir. 2000)(en banc)). With regard to both of Mr. Britting's ADEA claims, the Court must first decide whether Mr. Britting has made out a prima facie case before engaging in the remaining two prongs of the McDonnell Douglas analysis. Turlington, 135 F.3d. at 1432.

The prima facie cases for Mr. Britting's two ADEA claims are different. In order to make out a prima facie case for his demotion claim, Mr. Britting must show that: (1) he was a member of the protected class at the time he was demoted; (2) he was subject to an adverse employment action; (3) a substantially younger person filled the job from which he was demoted; and (4) he was qualified for the job from which he was demoted. Id. In order to make out a prima facie case for his job elimination claim due to reduction in force, Mr. Britting must show: (1) he was a member of the protected class at the time his job was eliminated; (2) he was qualified to perform his job when his job was eliminated; and (3) the employer intended to discriminated by eliminating the job due to his age. Standard v.A.B.E.L. Servs., Inc., 161 F.3d 1318, 1329 (11th Cir. 1998)(citing Jameson v. Arrow Co., 75 F.3d 1528, 1532 (11th Cir. 1996)). Because the Court finds that Mr. Britting has failed to make out a prima facie case with regard to both of his ADEA claims, the Court grants Motorola's motion for summary judgment wit respect to both of these claims and declines to address the remaining two prongs of the McDonnell Douglas framework.

a) Prima Facie Case for this Demotion Claim

Mr. Britting claims that his "demotion" from Telco and from his position as a systems engineer in the MISG, to the 800-line, was due to his age, and therefore, in violation of the ADEA. The parties do not dispute that Mr. Britting was over the age of forty and, therefore, a member of the protected class sat the time he was allegedly demoted. Therefore, Mr. Britting successfully makes out the first prong of the prima facie case. The Court must next decide whether Mr. Britting demonstrates that "an adverse employment action" was taken against him due to his age. In order to show that an adverse employment action was taken against him, Mr. Britting must demonstrate a "serious and material change in the terms, conditions, or privileges of employment." Davis v. Town of Lake Park, 245 F.3d 1232, 1239 (11th Cir. 2001)[4]. The terms, conditions or privileges must be effected in a "real and Demonstrable" way and "the employee's subjective view of the significance and adversity of the employer's actions is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances." Davis, 245 F.3d at 1239 (citing Doe v. Dekalb County Sch. Dist., 145 F.3d 1441, 1453 (11th Cir. 1998), for the proposition that an objective standard is also appropriate in the ADEA cases).

The harm predominantly alleged by Mr. Britting in his subjective belief that working on the 800-line was less prestigious than working at Telco or in the MISG and that his elf esteem suffered. While he claims that his bonus was in some way affected by the job switch, Mr. Britting does not present monetary figures to breath life into that argument. Motorola, on the other hand, argues that Mr. Britting's salary and status at Motorola stayed exactly the same when he was switched to the 800-line. In fact, Motorola contends that Mr. Britting was chose for the 800-line partially due to

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[4] While Davis is a Title VII race discrimination case, the Eleventh Circuit notes within the Davis opinion that the adverse employment requirement is consistent in the prima facie cases of all employment discrimination claims, including ADEA claims, and that the standards are "essentially interchangeable." Davis, 245 F.3d. at 1249; see also Crady v. Liberty National Bank and Trust Company of Indiana, et al., 993 F.3d 132 (7th Cir. 1993)(holding that the plaintiff failed to make out a prima facie case under the ADEA because she did not prove an adverse employment action).

the value his past experiences would bring to that job and that the transfer was in no way a "demotion."

The Eleventh Circuit has found a job transfer to be an adverse employment action even though there was no change in official status and salary. See Hinson v. Clinch County, Georgia Board of Education, 231 F.3d 821 (11th Cir.2000). However, in Hinson, the plaintiff was transferred from her job as the principal of a school to a "make-work" job which utilized none or little of her education or skills. Id. at 830. Unlike in Hinson, the Court finds that while some of Mr. Britting's daily tasks changed when he was transferred regarding Motorola's services, his skills as a systems engineer where still utilized on the 800-line. While he may not have preferred the 800-line, his experiences were still utilized on the 800-line. While he may not have preferred the 800-line, his experience was a driving force behind Motorola's decision to re-assign him and it is clear that Motorola considered the 800-line an important company project. Furthermore, Mr. Britting experienced little or no material changes as a result of the transfer in that neither his salary nor his status were adjusted. Additionally, the Court is unpersuaded by Mr. Britting's arguments with regard to a lost bonus. The Court finds that Mr. Britting's mere subjective observations with regard to the 800-line job are not enough to meet the objective test.[5]

Furthermore, the Court is unconvinced that MR. Britting was demoted. It is more likely that his work assignment was changed

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[5] The Court found tow points made by Mr. Britting in his deposition particularly helpful in discerning whether his transfer to the 800-line was an objective or a subjective "demotion." First, Mr. Britting complains that his co-workers on the 800-line were not college-educated, whereas he has a college degree. However, MR. Britting fails to note that his office co-workers were non-technical 800-line workers. He was the only technical 800-line worker on the east coast. Therefore, the education difference between him and those he shared office space with makes sense. Additionally, he admits that his college degree was in economics and that he learned the majority of his work skills through on-the-job training. Second, Mr. Britting focuses on the difference between giving technical assistance to those selling products to end-users, his job at Telco, and giving technical assistance to those selling products to pre-sale customers, his job on the 800-line. The Court is unpersuaded by this distinction and finds, therefore, that Mr. Britting's demotion was purely subjective.

due to Motorola's shifting economic and business needs. "Work assignment claims strike at the very heart of an employer's business judgment and expertise because they challenge an employer's ability to allocate its assets in response to shifting and competing market priorities." Davis, 245 F.3d at 1244. Motorola no longer needed the services its Telco branch once provided and Motorola was attempting to initiate and efficiently organize the 800-line. As a result, transfers were made, including the transfer of Mr. Britting. Therefore, Mr. Britting fails to make out a prima facie case for his demotion ADEA claim because he fails to prove that an adverse employment action was taken against him. The Court declines to assess whether Mr. Britting meets either the next two prongs of the prima facie case or the next two prongs of the McDonnell Douglas test and, for the reasons set out above, grants summary judgment in Motorola's favor with regard to the demotion ADEA claim.

b) Prima Facie Case for his Job Elimination Claim

Mr. Britting alleges that Motorola violated the ADEA when it terminated him by eliminating the position he held on the 800-line. Again, the parties agree that Mr. Britting was a member of the protected class when his 800-line job was eliminated due to the fact that he was over the age of forty at the time and, therefore, meets the first prong of the prima facie case. The parties also agree that Mr. Britting was qualified for the position he held and, therefore, meets the second prong of the prima facie case. Therefore, the only disagreement between the parties with respect to the prima facie case in the job elimination ADEA claim is whether MR. Britting has demonstrated any evidence of discriminatory intent on the part of Motorola.

Motorola argues that in 2001, the year Mr. Britting lost his job, 26,000 Motorola jobs were eliminated in a large-scale reduction in force driven by purely economic and business concerns. Mr. Britting's job was one of those eliminated at this time. Motorola contends that Mr. Britting's position was eliminated for the following reasons: (1) 26, 000 Motorola jobs were eliminated; (2) tow of the three systems engineer positions on the 800-line were eliminated because the company could no longer justify having

three people do that job; (3) Mr. Britting had the lowest performance rating of the three systems engineers working on the 800-line; and (4) due to the reaming economic concerns, Motorola has not since re-instated the two eliminated 800-line positions. In contrast to the numerous legitimate reasons proffered by Motorola for eliminating Mr. Britting's position as part of a large-scale reduction in force, Mr. Britting offers no evidence of discriminatory intent. Therefore, the Court finds that Mr. Britting has not met the prima facie case for his job elimination ADEA claim and summary judgment is granted in Motorola's favor with regard to that claim.

3. Mr. Britting's Breach of Contract Claim

Both parties have moved for summary judgment on Mr. Britting's breach of contract claim. Mr. Britting alleges that Motorola breached the Service Program "contract" by terminating him even though he was employed by Motorola for over ten years. Mr. Britting's argument is two-fold: (1) Georgia's at-will employment laws do not apply to him because he was not originally employed by Motorola in Georgia; and (2) even if Georgia's at-will employment laws apply to employees not originally hired in Georgia, he was not an at-will employee because the Service Program created an implied employment contract. Motorola disagrees with both of these contentions and, instead, argues that Georgia's at-will employment laws do apply to Mr. Britting and that he was an at-will employee at the time he was terminated. The Court will address these two arguments in turn.

First, Georgia Code § 34-7-1 provides that "indefinite hearing may be terminated at will by either party." See also Burritt v. Media Marketing Servs., 420 S.E.2d 792, 793; 204 Ga.App.848, 848(1992)("(a)n indefinite hiring may be terminated at will by either party, with or without cause, and there is no cause of action against an employer for an alleged wrongful termination")(internal citations omitted). Neither Mr. Britting nor Motorola cite case law or statutory provisions holding that because Motorola hired Mr. Britting in a different state, the employment laws of Georgia do not apply to him. IN fact, Mr. Britting lived in Georgia and worked in the Georgia facility for approximately five years and, therefore, the Court finds that he is subject to the Georgia employment laws,

however "archaic" he may perceive them to be. Therefore, the Georgia laws that an employer may terminate an at-will employee at any time applies to Mr. Britting if, in fact, the Court decides he was an at-will employee.[6]

Second, Mr. Britting argues that the Service Program created an implied contract between Motorola and all employees who worked at Motorola for ten uninterrupted years, or longer. Motorola argues that the Service Program is a company guideline, policy or practice, but in no way creates an implied contract between Motorola and its at-will employees. In Garmon v. Health Group of Atlanta, Inc., the Georgia Court of Appeals declined to interpret internal hospital termination policies as crating an implied contract between an at-will nurse and her employer. 369 S.E.2d 450; 183 Ga.App. 587 (1987). The Garmon Court held that to do so would "defacto transform her from an at-will employee into one under contract to the hospital, in violation of O.C.G.A. § 34-7-1." Id. at 453, 590. Other courts have likewise refused to transform company policies or manuals, like the Service Program, into implied contracts for at-will employees. See Nida v. Echols, 31 F.Supp2d 1358, 1376 (N.D. Ga 1998)(holding that under Georgia law "neither employment manuals nor other written information dispensed by an employer, unless they set forth that employment relationship is for a definite period of time, create contractual obligations the breach of which could give rise to a cause of action"); Traylor v. Bartow County, 860 F.Supp. 1526, 1537 (N.D. Ga. 1994)(interpreting Georgia at-will employment law).[7] Consequently, the Court holds that the Service Program was an internal policy made to benefit long-term employees but did not, under any circumstances, transform at-will employees into contract employees. Therefore,

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[6] Motorola contends that "there is no dispute' over whether MR. Britting is an at-will employee but it appears as if Mr. Britting is arguing that his at-will employment status effectively ended when he qualified for the Service Program.

[7] Mr. Britting cites the case of Martin v. Baer, 928 F.2d 1067 (11th Cir. 1991) for the proposition that certain personnel policies can be interpreted as implied contracts. Not only does the Court find that Martin does not stand for that proposition, but the Court notes that the Martin court was interpreting Florida and Michigan law, rather than Georgia law, the applicable law in this case.

pursuant to O.C.G.A. § 34-7-1, Motorola was entitled to terminate Mr. Britting at any time, despite his seniority.

Furthermore, Motorola argues that even if the Court were to find that an implied contract exists via the Service Program, Mr. Britting cannot prove a breach. Mr. Britting argues that Motorola breached paragraph 4 of the Service Program policy. However, Motorola correctly contends that paragraph 4 applies to ten-year employees that have been laid off. Paragraph 5, on the other hand, applies to ten-year employees whose jobs are eliminated. Mr. Britting and Motorola agree that Mr. Britting's 800-line job was eliminated has not been restored since that time. Therefore, the Court agrees with Motorola that paragraph 5, not paragraph 4, applies. Motorola's only obligation to Mr. Britting under paragraph 5 was to "document evidence that reasonable efforts have been made to identify and reassign [him] to other jobs for which [he is] qualified" before eliminating his position. The Human Resources Department at Motorola made a concerted effort to find Mr. Britting another position within Motorola. He had several interviews and failed to get another job due to lack of skills, the hiring freeze or personality concerns caused by his own negative comments. Therefore, the Court finds that, even if the Service Program created an implied contract, Mr. Britting has shown no evidence of a breach.

For the reasons set forth above, the Court grants summary judgment in Motorola's favor with respect to Mr. Britting's breach of contract claim.

4. Mr. Britting's Unjust Enrichment Claim

To make out a claim for unjust enrichment, Mr. Britting must show that no contract existed between him and Motorola and "(1) that the plaintiff conferred a benefit on the defendant and (2) that equity requires the defendant to compensate the plaintiff for this benefit." Chem-Nuclear Sys. v. Arivec Chems., 978 F.Supp. 1105, 1110 (N.D. Ga. 1997)(interpreting Georgia law and citing Engram v. Engram, 463 S.E.2d 12; 265 Ga.804 (1995)). The Court finds that no benefits were conferred upon Motorola by Mr. Britting except those conferred in the context of Mr. Britting's employment. Mr. Britting was paid by Motorola for his services as an employee, thereby preventing Motorola from being "unjustly" enriched by Mr.

Britting's services. Therefore, equity does not demand that Motorola further pay Mr. Britting for his services and summary judgment is granted in Motorola's favor.

5. Mr. Britting's Fraud/Misrepresentation Claim

Under Georgia law, the tort of fraud has five elements: "(1) false presentation by the defendant; (2) scienter; (3) intention to induce the plaintiff to act or refrain from acting; (4) justifiable reliance by the plaintiff; and (5) damage to the plaintiff." Reeves et.a. v. Edge et. al., 484 S.E.2d 498, 501; 225 Ga. App. 615, 618 (1997). In order to survive the summary judgment phase, Mr. Britting must provide "some evidence from which jury could find each element of the tort." Id. (quoting Cobb County School Dist. v. MAT Factory, 215 Ga. App. 697, 700—1(2)(a); 452 S.E.2d 140 (1994); see also Farmers State Bank v. Huguenin, 469 S.E.2d. 34, 36; 220 Ga. App. 657, 660 (1996). Therefore, if Mr. Britting fails to meet that standard with regard to even one of the required elements of fraud, the Court is obligated to grant summary judgment in Motorola's favor.

Mr. Britting's fraud claim revolves around the proposed voluntary separation agreement offered to Motorola employees whose jobs were being eliminated due to the 1999 reduction in force. Mr. Britting, whose job was initially to be terminated in 1999 before it was restored, was offered to partake in this voluntary separation agreement and refused. However, he appears to have interpreted the word "voluntary" on the form agreement as Motorola's attempt to trick him and to usurp his contractual free will. Motorola correctly points out that the agreement was never activated because Mr. Britting did not sign it and that the conditional words it the agreement was never activated because Mr. Britting did not sign it and that the conditional words in the agreement, "if you sign this letter," should have made the strictly conditional nature of the document obvious. The Court agrees.

While Mr. Britting also makes several other claims of fraud and misrepresentation against Motorola, he fails to explain these claims completely. Furthermore, Mr. Britting has not provided one piece of evidence indicating scienter on Motorola's part. Therefore, summary judgment is granted in Motorola's favor with respect to Mr. Britting's fraud/misrepresentation claim.

6. Mr. Britting's Remaining Tort Claims

Mr. Britting has also alleged claims of false light privacy invasion, conversion of personal property, respondent superior liability for intentional torts of employees and slander. The Court finds that Mr. Britting has provided no evidence that would allow a reasonable jury to substantiate these claims. Therefore, the Court grants Motorola's motion for summary judgment with respect to these remaining tort claims.

C. Motorola's Motion for Default Judgment on Counterclaim

Motorola filed a counterclaim against Mr. Britting alleging that he is unlawfully holding certain property that belongs to Motorola. As relief, Motorola requested either the return of its personal property or compensation amounting to the monetary value of its personal property, as well as attorneys fees acquired in connection with the counterclaim. Mr. Britting failed to respond in any way to Motorola's counterclaim for more than 120 days after being served.[8] Mr. Britting responded to Motorola's motion for entry of default by claiming that he has already returned Motorola's property to Motorola, and therefore, the counterclaim should be dismissed as moot. Motorola replied to Mr. Britting's response, refuting that is personal property has been returned and pointing to a portion of Mr. Britting's deposition in which he admitted to still having the property.

Therefore, the Court directs the Clerk to enter Mr. Britting's default on the docket pursuant to Federal Rules of Civil Procedure 55(a). In addition, pursuant to Federal Rule of Civil Procedure 55(b)(2), the Court enters a default judgment against Mr. Britting. However, because Motorola failed to list the property to be returned, or to provide the Court with the monetary value of that

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[8] While Mr. Britting did actively participate and appear before the Court in reference to his own claims against Motorola, he nonetheless failed to answer or file relevant motions with regard to Motorola's counterclaim. Therefore, according to Federal Rule of Civil Procedure 55(d), default may be entered against Mr. Britting as a counterclaim-defendant, just as it would if he were the named defendant in this case.

property or to submit an affidavit regarding attorneys' fees, the Court is unable at this time to delineate the exact damages owed to Motorola by Mr. Britting. Accordingly, Motorola ahs ten (10) days from the date of this Order to submit an affidavit containing the above-listed information. Mr. Britting has ten (10) days from the date the affidavit is submitted to respond if necessary. Thereafter, the Court will issue an Order regarding the appropriate damages with respect to the counterclaim.

III. CONCLUSION

For the reasons set forth above, Motorola's motion for sanctions [9] is GRANTED IN PART and DENIED IN PART, Mr. Britting's motion for leave to file response out of time to Motorola's motion for sanctions [13] is GRANTED, Mr. Britting's motion for summary judgment [15] is DENIED, Motorola's motion for summary judgment [17] is GRANTED and Motorola's motion for default judgment on its counterclaim against Mr. Britting [25] is GRANTED.

Motorola is ordered to submit an affidavit to the Court expressing the following information within ten (10) days of this Order: (1) a list of the property to be returned; (2) the monetary value of the property to be retuned; and (3) attorneys' fees incurred in relation to the counterclaim. Mr. Britting may respond to Motorola's affidavit within ten (10) days of its submission. Furthermore, Mr. Britting is ordered to pay Motorola the amount of $51.12 with ten (10) days of the date of this Order.

It is so ORDERED this 6 day of March, 2002.

S/ Willis B. Hunt, Jr.
Willis B. Hunt, Jr.
Judge, United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NORMAN A. BRITTING,	:	Filed in Clerk's Office
	:	U.S.D.C. Atlanta
Plaintiff,	:	March 21, 2002
	:	Luther D. Thomas,
	:	clerk
	:	By: S/ J. Mortz
	:	Deputy Clerk
	:	
vs.	:	CIVIL ACTION NO.
	:	1:01-CV-0339-WBH
MOTOROLA, INC., et al.,	:	
	:	
Defendants.	:	

PLAINTIFF'S NOTICE OF APPEAL

Notice is hereby given that Plaintiff Norman Britting in the above styled case, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the order granting Defendant Motorola's motion for sanctions, Defendant Motorola's summary judgement, Defendant Motorola's motion for default judgement on it's counterclaim,
and the denial of Plaintiff Britting's motion for summary judgement claim, entered in this action the seventh day of March, 2002.

This 2nd day of March, 2002.

Respectfully submitted,

EXHIBIT 6

"s/Roy Mullman"
ROY MULLMAN, ESQ.
Attorney for Plaintiff
Georgia Bar No. 527299

Mullman & Associates, P.C.
One Live Oak Center, Suite 980
3475 Lenox Road, N.E.
Atlanta, GA 30326
(404) 365-8800

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing Pleading upon counsel of record by placing a copy of same in an envelope with sufficient postage affixed thereon and depositing in the U.S. mail, addressed as follows:

Mary Ann B. Oakley, Esquire
Holland & Knight, LLP
Suite 2000, One Atlantic Center
1201 West Peachtree Street, NE
Atlanta, GA 30309-3400

This 2nd day of March, 2002.

MULLMAN &ASSOCIATES, PC

"s/Roy Mullman"
Roy Mullman

3475 Lenox Road, NE
Suite 980
Atlanta, GA 30326
(404) 365-8800

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-11650-AA

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
April 16, 2002
THOMAS K. KAHN
CLERK

NORMAN A. BRITTING,

Plaintiff-Appellant,

Versus

MOTOROLA INC.,
JOHN DOE, 1-10, and,
ABC CORPORATION, 1-10

Defendants-Appellees

Appeal from the United States District Court for the
Northern District of Georgia

ENTRY OF DISMISSAL

Pursuant to 11th Cir.R.42-1(b), this appeal is hereby dismissed for want of prosecution because appellant has failed to pay the $100 docketing and $5 filing fees ($105) to the district court within the time fixed by the rules, effective this 16th day of April, 2002.

THOMAS K. KAHN
Clerk of the United States Court
Of Appeals for the Eleventh Circuit
By: Russell Tanker
Deputy Clerk

FOR THE COURT – BY DIRECTION
EXHIBIT 7

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NORMAN A. BRITTING	: Filed
	: U.S. Court of Appeals
Plaintiff,	: Eleventh Circuit
	: April 22, 2002
	: Thomas K. Kahn
	: Clerk
vs.	: CIVIL ACTION NO.
	: 02-11650-A
MOTOROLA, INC., et al.,	:
	:
Defendants.	:

APPELLANT'S MOTION TO REINSTATE APPEAL

COMES NOW, Appellant in the above-referenced matter and respectfully request that this Honorable Court reinstate the instant Appeal dismissed by the Clerk.

On March 21, 2002 Plaintiff/Appellant filed a timely Notice of Appeal with the United States District Court for the Northern District of Georgia, Atlanta Division, of an Order granting Defendant/Appellee's motion for sanctions – in part granting Defendant/Appellee's motion for summary judgment and granting Defendant/Appellee's motion for default judgment on its counterclaim against Plaintiff/Appellant, the District Court's Order was entered on March 7, 2002.

On March 25, 2002, the Clerk of the District Court notified Appellants that they needed to pay the docketing/filing fee of $105.00 to the U.S. District Court (please see Exhibit A-1, attached hereto). On March 28, 2002,

EXHIBIT 8

the Clerk of this Honorable Court notified Appellants that they must pay the $105.00 fee and file the Civil Appeal Statement with the Clerk of the United States Court of Appeals, Eleventh Circuit within fourteen days (please see Exhibit A-2, attached hereto). On March 28, 2002, Plaintiff/Appellee submitted a money order in the amount of $105.00 to the Clerk (please see Exhibit B, attached hereto). On April 3, 2002, Plaintiff/Appellee submitted its Civil Appeal Statement (please see Exhibit C, attached hereto). On April 16, 2002 the Clerk of the United States Court of Appeals entered a Dismissal of the instant Appeal for alleged failure to prosecute the appeal, by failing to pay the aforementioned docketing fee.

Appellant maintains that the requisite fees were paid. As described above and shown by the attached exhibits, the money order in the amount of the fees due was properly addressed and mailed to the Clerk. On April 18, 2002, the paralegal of Appellants, who mailed the money order, contacted the company that issued the money order, via the automated system, the paralegal confirmed that the money order had been redeemed (please see Exhibit D, attached hereto). However, the automated system does not provide information regarding the party that redeemed the money order. This information must be discovered by paying a fee and submitting a form request for said information. On April 17, 2002 Appellant requested this information (please see Exhibit E, attached hereto).

It is Appellant's position that the money order in the amount of fees due on this appeal was stolen from the mail b y some unknown third party or that there has been a inadvertent accounting mistake in the Clerk's office, and not by any failure of the Appellant.

WHEREFORE, Appellants respectfully request that the Appeal be reinstated pursuant to 11th Cir. R.27-1(c)(11).

Respectfully submitted, this 18th day of April 2002.

ROY MULLMAN, ESQ.
Attorney for Plaintiff
Georgia Bar No. 527299

Mullman & Associates, P.C.
One Live Oak Center, Suite 980
3475 Lenox Road, N.E.
Atlanta, GA 30326
(404) 365-8800

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing Pleading upon counsel of record by placing a copy of same in an envelope with sufficient postage affixed thereon and depositing in the U.S. mail, addressed as follows:

Mary Ann B. Oakley, Esquire
Holland & Knight, LLP
Suite 2000, One Atlantic Center
1201 West Peachtree Street, NE
Atlanta, GA 30309-3400

This 18th day of April 2002.

MULLMAN &ASSOCIATES, PC

S/Roy Mullman
Roy Mullman

3475 Lenox Road, NE
Suite 980
Atlanta, GA 30326
(404) 365-8800

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-11650-AA

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
June 13, 2002
THOMAS K. KAHN
CLERK

NORMAN A. BRITTING,

Plaintiff-Appellant,

Versus

MOTOROLA INC.,
JOHN DOE, 1-10, and,
ABC CORPORATION, 1-10

Defendants-Appellees

Appeal from the United States District Court for the
Northern District of Georgia

ENTRY OF DISMISSAL

Pursuant to 11th Cir.R.42-2(c), this appeal is hereby dismissed for want of prosecution because appellant has failed to file an appellant's brief and record excerpts within the time fixed by the rules, effective this 13th day of June, 2002.

THOMAS K. KAHN
Clerk of the United States Court
Of Appeals for the Eleventh Circuit

By: Wendi Tilden
Deputy Clerk
S/Wendi Tilden

FOR THE COURT – BY DIRECTION
EXHIBIT 9

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NORMAN A. BRITTING,	: U.S. Court of Appeals
	: Received Clerk
Plaintiff,	: June 25, 2002
	: Atlanta
vs.	: CIVIL ACTION NO.
	: 02-11650-A
MOTOROLA, INC., et al.,	:
	:
Defendants.	:

APPELLANT'S MOTION TO SET ASIDE DISMISSAL

COMES NOW, Norman A. Britting, Appellant in the above-referenced matter and respectfully request that this Honorable Court grant Appellant's Motion to Set Aside Dismissal and shows the following:

Pursuant to Eleventh Circuit Rule 42-2, an appeal dismissed under this rule may be reinstated upon the filing of a Motion to Set Aside the Dismissal and Remedy the
Default by showing extraordinary circumstances, accompanied by the required brief and record excerpts, and must be filed within fourteen days after the order dismissing the appeal is entered by the clerk.

EXHIBIT 10

In this case, the clerk of the court filed its Entry of Dismissal on June 13, 2002. Therefore, this motion and the accompanying brief and record excerpts are timely filed prior to June 27, 2002. A copy of the Entry of Dismissal is attached hereto and marked as **Exhibit A.**

Extraordinary circumstances affecting the filing of the required brief and record excerpts in this case are as follows:

On March 21, 2002 Plaintiff/Appellant filed a timely Notice of Appeal with the United States District Court for the Northern District of Georgia, Atlanta Division, of an Order granting Defendant/Appellee's motion for sanctions – in part, granting Defendant/Appellee's motion for summary judgment and granting Defendant/Appellee's motion for default judgment on its counterclaim against Plaintiff/Appellant, the District Court's Order was entered on March 7, 2002.

On March 25, 2002, the Clerk of the District Court notified Appellants that they needed to pay the docketing/filing fee of $105.00 to the U.S. District Court. On March 28, 2002, the Clerk of this Honorable Court notified Appellants that they must pay the $105.00 fee and file the Civil Appeal Statement with the Clerk of the United States Court of Appeals, Eleventh Circuit within fourteen days. On March 28, 2002, Plaintiff/Appellee submitted a money order in the amount of $105.00 to the Clerk. On April 3, 2002, Plaintiff/Appellee submitted its Civil Appeal Statement. On April 16, 2002 the Clerk of the United States Court of Appeals entered a Dismissal of the instant Appeal for alleged failure to prosecute the appeal, by failing to pay the aforementioned docketing fee.

Thereafter, Appellant filed its Motion to Reinstate the Appeal, along with its civil appeal statement, showing that in fact the docket fee was paid by money order. The money order was received and redeemed by the District Court on April 4, 2002, but apparently an inadvertent accounting error resulted in a showing that the fee had not been paid. After consideration of Appellants evidence of payment and apparently some forensic accounting by the clerk, the appeal was reinstated.

In early April 2002 the clerk of this Honorable Court contacted the parties and expressed a doubt as to whether this Honorable Court had jurisdiction over the case and requested that the parties advise the court of their positions regarding the jurisdictional question of whether a final order was entered by the District Court. Appellant filed its brief regarding

jurisdiction showing that a final order had been entered by the District Court, along with its Certificate of Interested Persons and Corporate Disclosure Statement, on or about April 23, 2002.

The Appellant has not received notice from the court as to its decision regarding jurisdiction. The Appellant has not received notice that its brief and record excerpts are overdue.

Considering the above-described issues, whereby the Appellant was placed in a position to explain that in fact the docket fee was paid, thereby reinstating the once dismissed appeal, which was dismissed due to no failure by the appellant; and whereby the Appellant was placed in a position to explain why this Honorable Court has jurisdiction over the case, thus again facing dismissal and to date not having a decision from the court regarding jurisdiction, create an accumulation of extraordinary circumstances, which in fairness should permit the Appellant to remedy default and continue the prosecution of this appeal.

WHEREFORE, Appellant respectfully prays that the Appeal of this matter be reinstated, allowing the Appellant to cure default and file its brief and record excerpts.

Respectfully submitted, this 25th day of June 2002.

MULLMAN & ASSOCIATES, P.C.
S/Roy Mullman
Roy Mullman
Georgia State Bar No.: 529277
Attorney for Plaintiff

One Live Oak Center, Ste. 980
3475 Lenox Road, N.E.
Atlanta, Georgia 30326
(404) 365-8800

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing Pleading upon counsel of record by placing a copy of same in an envelope with sufficient postage affixed thereon and depositing in the U.S. mail, addressed as follows:

Mary Ann B. Oakley, Esquire
Holland & Knight, LLP
Suite 2000, One Atlantic Center
1201 West Peachtree Street, NE
Atlanta, GA 30309-3400

This 25th day of June 2002.

MULLMAN &ASSOCIATES, PC

S/Roy Mullman
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL CASE NO.: 02-11650-A

NORMAN A. BRITTING,
Appellant,
vs.
MOTOROLA, INC., et al.,
Appellees.

U.S. Court of Appeals
Received Clerk
July 18, 2002
Atlanta, GA.

Appeal from the United States District Court For the Northern District of Georgia Atlanta Division

BRIEF OF APPELLANT

EXHIBIT 11

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Norman Britting
Holland & Knight, LLP
Motorola, Inc.
Mullman & Associates, P.C.,
Roy Mullman, Esq.
Marry Ann Oakley, Esq.

See attachment "A" for a list of others related to Motorola, Inc. with an interest in this case.

STATEMENT REGARDING ORAL ARGUMENT

Appellant believes that oral argument will beneficially assist this Honorable Court in its determination of the basis for Appellant's Appeal, and the grounds supporting the argument that this Honorable Court should reverse the judgment render by the lower court.

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United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962)

STATEMENT REGARDING THE ADOPTION OF BRIEFS OF OTHER PARTIES

No brief of other parties has been adopted in this Appeal.

STATEMENT OF JURISDICTION

The District Court denied Norman Britting's Motion for Summary Judgment on his claims of Breach and Fraud. This is not a final order in and of itself, however, in conjunction with the District Court's granting Motorola's Motion for Summary Judgment on these issues, the district court made a final decision and it may be appealed to this Court.

The District Court granted Motorola's Motions for Summary Judgment against Norman Britting's claims of Breach, Fraud, ADEA, and other state law based claims sounding in Tort. This is a final order regarding each claim in the district court and may be appealed to this Court Finn v. Gunter, 722 F2d. 711 (11th Cir. 1984).

The District Court granted Motorola's Motions for Summary Judgment on its counterclaim. This is a final order in the district court and may be appealed to this Court Finn v. Gunter, 722 F2d. 711 (11th Cir. 1984).

All issues have been subject to a final order by the District Court. Therefore, each final order is properly appealed to this Court. Finn v. Gunter, 722 F2d. 711 (11th Cir. 1984).

STATEMENT OF THE ISSUES

Whether the District Court Judge properly ordered the granting Motorola's Motions for Summary Judgment against Norman Britting's claims based on Breach, Fraud, ADEA, and other state law based claims sounding in Tort, and properly ordered the granting of Motorola's Motions for Summary Judgment on its counterclaim against Norman Britting.

STATEMENT OF THE CASE

1. **Course of Proceedings and Disposition in the Court Below:**

Norman Britting exhausted all of the administrative remedies available to him under the Age Discrimination in Employment Act "ADEA") and then filed his Complaint in the District Court against Motorola on February 5, 2001, including Britting's state law based causes of action. Motorola filed its Answer on or about March 15, 2001. Britting filed his Motion for Summary Judgment, along with his statement of Material Facts To Which There Is No Dispute on August 13, 2001. Motorola filed its Motion for Summary Judgment on or about August 31, 2001. Britting filed his Response to Motorola's Motion for Summary Judgment on September 21, 2001. The District Court entered its final order regarding all issues in this case on March 7, 2002.

Britting filed his Notice of Appeal on March 21, 2002. On April 16, 2002 the clerk made an Entry of Dismissal, Britting filed his Motion to Set Aside Dismissal on April 22, 2002 and the appeal was reinstated. On June 13, 2002 the clerk made its Entry of Dismissal, on June 25, 2002, Britting filed his Motion to Set Aside Dismissal, and now files this, his Appellate Brief and Record Excepts.

2. **Statement of the Facts:**

Britting was hired by Motorola, Inc. (hereinafter referred to as "Motorola"), in January, 1982. Britting was initially employed by Motorola in Seattle, Washington. However, Britting was transferred to several other employment locations of the 's business locations and at the time of Britting's employment termination he was employed by Motorola at 2121 Newmarket Parkway, Suite 130, Marietta, Georgia, as a Consulting Systems Engineer for the Motorola Information Systems Group.

In early 1996, while Britting was employed with Motorola at its Mansfield, Massachusetts facility, he was approached by his superiors and provided two choices. The first choice was employment termination. The second choice, which Britting accepted, under duress via the aforementioned threats of employment termination was for Britting to be transferred to Marietta, Georgia facility under the (false) presentation that the

transfer was pursuant to the terms of the Senior Service Club 10-Year Employee Program.

At all material times, Britting employment functions at and while employment facility in his position as a Consulting Systems Engineer for the Motorola Information Systems Group (hereinafter referred to as the "MISG") and performance was performed at or above the requirements of his employment position.

Without any prior notice, on June 10, 1999, Britting was summoned into a meeting and advised that his "resignation" was accepted. The only problem being that Britting had not tendered any such claimed "resignation" notification, notice or otherwise to Motorola, the work facility or his superiors whatsoever.

Britting was advised, pursuant to Britting's Service Club 10-Year Employee Program (hereinafter referred to as the "SC10EP"), that Britting had twenty-one (21) days in which to find new employment within the Motorola employment field. Britting was presented a termination package.

On July 15, 1999, Motorola's authorized agent, one Dave Gowen, traveled from Dallas to the Marietta facility where Britting was working and met with Britting and requested that Britting execute the termination package documents. Britting's review of the termination package documents included a release that Britting would relinquish and/or make no claims pursuant to any federal or state law rights.

When Britting advanced that he was disinclined to waive both federal and state rights, Mr. Gowen, advised Britting that he would be given an additional ninety (90) days in which to locate other employment within Motorola and be accepted by that division or department. While the aforementioned offer was advanced, Motorola's employees embarked upon a course of conduct, which ensured that Britting would not be able to find alternative employment within the company. That course of conduct ensuring that Britting would not find alternative employment within Motorola commenced with providing false performance review statements which was reflected in Britting's annual performance review evaluation report. When these records were reviewed by other divisions within Motorola, Britting was logically not considered for any of the positions which Britting applied for.

On August 15, 2000, Britting, as an engineer, was demoted to a position of answering phones while two similarly-situated employees were allowed to remain in their positions, while younger, being paid less and given Britting's employment responsibilities. Britting was never informed of any basis, in fact or otherwise for the instant demotion. Britting refused to allow the instant retaliatory demotion to result in his voluntary self-termination.

Once again, on January 4, 2001, Britting was ordered into a meeting with John Chevry, an authorized agent for Motorola pursuant to Motorola's continuing intention to involuntarily terminate Britting. A second meeting was held on January 5, 2001, in which, for a second time, Motorola's agents informed Britting of the specifics of the involuntary separation package which Motorola had wanted Britting to agree to. Britting was thereinafter given the involuntary separation package.

On January 26, 2001, Britting was terminated from his employment with Motorola in violation and breach of the Service Club 10-Year Employee Program. Britting filed with the U.S. Equal Employment Opportunity Commission ("EEOC") and received a notice dated December 7, 2000, of Britting's right to sue. After receipt of the EEOC right to sue letter, the above-styled cause of action was filed.

3. **Statement of the Standard or Scope of Review for each Contention:**

This court reviews the district court's grant of summary judgment de novo. McGahee v. Northern Propane Gas Co., 858 F.2d 1487, 1492-93 (11th Cir. 1988), cert. denied, 490 U.S. 1084, 109 S. Ct. 2110, 104 L. Ed. 2d 670 (1989).

Summary judgment is appropriate only if the pleadings and evidence in the record demonstrate that there is no genuine issue of material fact as to any issue and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986).

On summary judgment, the reasonable inferences to be drawn from the facts must be viewed in the light most favorable to

the party opposing the motion. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S. Ct. 1348, 1356-57,89 L. Ed. 2d 538 (1986), quoting United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962).

The nonmoving party, however, "must present affirmative evidence in order to defeat a properly supported motion for summary judgment," Anderson, 477 U.S. at 257, 106 S. Ct. at 2514, and must show "that there is a genuine issue for trial." Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356; Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575, 1579 (11th Cir. 1988).

SUMMARY OF ARGUMENT

The District Court improperly granted Motorola's Motions for Summary Judgment because Britting clearly showed that, in the least, there were genuine issues of material fact as to the issues and that the moving party was *not* entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986). The trial court abused its discretion in ruling in favor of Motorola's motion.

ARGUMENT AND CITATION OF AUTHORITY

The District Court improperly granted Motorola's Motions for Summary Judgment.

a. **Georgia's Right to Work Laws are Not Applicable to the Case at Bar**

The State of Georgia is a right to work state, which equates to the right of an employer to terminate an employee with, or without cause. Unless there is a signed employment contract, an employee does not have a right to challenge the employer's termination other than for worker's compensation or unemployment benefits unless there has been employment discrimination which first must be addressed the U.S. Equal Employment Opportunity Commission ("EEOC"), prior to bring suit. Sheet Metal Workers International Association v. Carter, 133 Ga. App. 872 (1975); Evans v. Bibb Co., 342 S.E.2d 484 (Ga. Ct. App. 1986).

The law in Georgia now states that an "employer, with or without cause and regardless of its motives may discharge the employee without liability."[Cits.]" Troy v. Interfinancial, 171 Ga. App. 763, 766 (1) (320 S.E.2d 872) (1984). See Borden v. Johnson, 196 Ga. App. 288-89 (1990). However Britting does not and has never fallen prey to Georgia's employment laws under the facts of the case. The District Court committed reversible error when it held that Britting was subject to Georgia's employment laws.

Britting's employment with Motorola commenced outside the State of Georgia, including the implied employment contract and therefore Georgia's employment laws are not applicable to the case at bar. The court below failed to give proper weight to the evidence and abused its discretion when it determined otherwise.

b. **Britting's "Senior Service" Contractual Rights**

Because Britting's employment falls outside the legal perimeters of Georgia's employment "at will" laws, Britting advances that he was contractually protected pursuant to his employment under the Senior Service Club 10-Year Employee Program.

Motorola, Pursuant to Policy #7: Respect for Senior Service, has instituted the following Human Resources Policy:

> Motorolans who have a record of long service with the company have earned respect. Recognition and certain special considerations. We rely on long-service employees to be role models and mentors in the Motorola culture and, therefore, expect them to maintain performance and contributions at a level that others will regard as exemplary.
>
> . . . . . .
>
> Employees with unbroken long service (based on service date) are provided with special considerations when certain employment decisions are made:
>
> Special approval levels are required prior to the downgrade or reduction in salary of an employee with a service date of 10 or more years. These approval requirements are outlined in Policy # 10 – Compensation Approvals.
>
> ***Prior approval of the chairman and chief executive officer is required for the termination or layoff of any employee with 10 or more years of service*** (based on service date). Employees may be nonscheduled, with or

time required approvals will normally result in a Class III infraction for the manager or supervisor and the responsible human resource representative.

Employees with 10 or more years of service (based on service date), whose performance had dropped below the acceptable level, may be terminated for poor performance with the prior approval of the chairman and chief executive officer. Approval requirements are:

- At least two written documentations within the past 12 months.
- One of these documents should be a performance improvement plan with specific performance expectations, measurement dates and indication that the employee may be subject to termination if performance does not improve.
- A reasonable period of time (normally 3 to 6 months) following the performance improved performance.
- A final performance improvement plan.

4. ***Employees with a service of 10 or more years will not be involuntarily laid off.*** They may volunteer for layoff, but are not guaranteed a recall. Volunteers refusing a reasonable offer to return to active status may be terminated from layoff.

5. Employees with a service date of 10 or more years will not be subject to involuntary separation due to the closing of a facility or elimination of jobs, without documented evidence that reasonable efforts have been made to identify and reassign them to other jobs for which they are qualified. Employees may be subject to involuntary separation due to the sale of an operation when the employee transfer is part of the sales contract. Prior chief executive officer approval is required in these cases.

6. If an employee with a service of 10 or more years wishes to volunteer for a permanent reduction in force, the sector/group general manager and the director of human resources may approve the separation after interviewing the employee. In addition, a volunteer with a service of 25 or more years requires prior approval of the chief executive officer.

Policy # 7: Respect for Senior Service (Emphasis Added).
See Exhibit "B" as attached hereto.

Thus, the presentation of the ***voluntary*** resignation documents, not authored by Britting constitutes fraud by the applicable individuals of Motorola.
Thus, the Motorola's authorized agents fraudulently created a resignation document and on June 10, 1999, thereinafter demanded that Britting sign the same ***as if Britting had authored or originated that document***. Again, on July 15, 1999, Motorola's authorized agent Dave Gowen, traveled from Dallas to Georgia and again attempted to intimidate Britting into signing the termination/resignation package and when Britting refused to concede to the second fraudulent attempt, stated that Britting would be allowed an additional 90 days to find employment within Motorola.

Likewise, Britting's job demotion by Motorola was clearly and absolutely against the instant policy, which occurred on August 15, 2000. Two younger individuals assumed Britting's position while Britting was delegated to answering telephones. [1]

On January 4, 2001, Britting was informed that he was attend a personal meeting with John Chevry, to now discuss Britting's pending involuntary termination without absolutely any prior knowledge being given. On July 5, 2001, Britting attended that meeting with Mr. Chevry. At that hearing Britting was provided with an involuntary separation package, which breached the Policy #7: Respect for Senior Service requirements and procedures.

On January 26, 2001, Britting was terminated from his employment with Motorola.

The court below failed to give proper weight to these facts and circumstances, thereby committing reversible error.

c. **Breach of Britting's Implied Employment Contractual Rights**

It is Britting's position that Britting's employment was protected pursuant to policy and procedures which clearly stated the employment rights of employees who worked for Motorola for more than ten (10) years were granted special status within the company in relationship to other employees who had not worked for Motorola for ten or more years.

---

[1] Britting's demotion to answering telephone phones continued until his termination on January 26, 2001.

Motorola, via its employment policies have clearly provided Britting with protected employment rights which absolutely equates to an **"implied contract"** based upon various Motorola policies and procedures that absolutely provided for protection against the very thing that has taken place in the instant case. Hence, it is Britting's position that Britting's numerous years of employment with Motorola have **"created a situation 'instinct' with obligations."**

The Eleventh Circuit Court of Appeals in Martin v. Baer, 928 F.2d 1067 (11th Cir. 1991), came across similar claims in a case out of Florida. While the Martin Court did not, under the circumstances of that case, find an implied contract relating to protections against false sexual harassment claims, the Court nevertheless recognized the reality of such claims may be advanced. Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980) holding that explicit policy manual provisions and oral representations by employers sometimes can create "special circumstances" justifying an exception to the usual presumption of at-will employment). The reason that the Martin Court did not find the instant company policy applicable to him because ". . . he [was] *not* the *primary beneficiary* of the policy."

In the case at bar, Policy #7 was *specifically written to protect Britting and other employees who had worked for Motorola for more than ten years.*

Furthermore, pursuant to Section 3., of Policy #7, it is absolutely and irrefutable that Motorola willfully did not comply with the termination provisions as required dealing with Britting's recognized tenured employment status. Absolutely nothing in any of the documents, relating to Britting's termination shows that it was "*. . . with the approval of the chairman and chief executive officer*" as mandated pursuant to absolutely crystal clear terms of the instant policy. Likewise, and furthermore, the record is absolutely devoid, upon the part of Motorola, that Motorola invoked, used or utilized any of the four (4) subparagraphs required to be performed, prior to Britting's termination.

Motorola, and its authorized agents, not only violated the specific conditions of Policy #7, they did it acting outside the legal perimeters of Britting's stated rights under that policy.

Again, the court below failed to give proper weight to Britting's evidence and committed reversible error in its order granting Motorola's motion for summary judgment.

d. **Motorola's Fraudulent Conduct**

Britting advances, notwithstanding Britting's other claims, that Motorola committed a fraud against Britting by the fraudulent creation of the resignation documents created prior to June 10, 1999, and thereinafter tendered to Britting to sign on June 10, 1999.

It is Britting's position that the creation of the fraudulent resignation documents and the tendering of the same to Britting and thereinafter continuing their demands that Britting terminate his employment via the fraudulent resignation documents must be absolutely drawn in the legal sands against Motorola.

The essential elements of an action for fraud and deceit are: (1) that Motorola made the representations; (2) that at the time Motorola knew they were false; (3) that Motorola made them with the intention and purposes to commit the fraud; (4) that Britting reasonably relief upon such representations, and; (5) that Britting sustained the alleged loss and damage as the approximate cause of Motorola's conduct. Brown v. Ragsdale Motor Co., 65 Ga. App. 727 (1941); Cosby v. Asher, 74 Ga. App. 884 (1947).

When Motorola presented the fraudulent resignation documents, stating that Motorola had agreed to the same, Britting exercised his rights and refused to sign the same. However, Motorola continued to demand and commit further acts and actions against Britting because he refused to become a party to Motorola's

fraudulent efforts to terminate him. See Daniel v. Dalton News Co., 48 Ga. App. 772 (1934).

When Motorola's authorized agents fraudulently created documents and thereinafter continued their fraudulent conduct with further fraudulent documents and claims, within those documents, Britting has a cause of action for fraud. The gist of Britting's fraud claims against Motorola rests upon the fraudulent creation of the resignation documents and the deceitful and fraudulent employment reviews and reports, which were fraudulently utilized for the fraudulent purposes of fraudulently terminating Britting's employment. Dundee Land Co. v. Simmons, 204 Ga. 248 (1948). In other words, Motorola created false employment records relating to Britting as a basis to terminate him. Hertz Corp v. Cox, 430 F.2d 1365 (5th Cir. 1970), cert. denied, 414 U.S. 825 (1973).

The Georgia Court of Appeals in Grainger v. Jackson, 122 Ga. App. 123 (1970) has stated that fraud is "in itself subtle," and circumstances apparently trivial or almost inconclusive, if separately considered, may by their number and joint operation be sufficient to constitute conclusive proof.

It is Britting's position that the evidence supporting the issue of fraud is more than sufficient to have prevented the court below from granting Motorola's motion for summary judgment on the issue.

e. **Age Discrimination**

Britting advanced his age discrimination count in the above-styled cause of action pursuant to the Federal Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., as amended ("ADEA").

Britting believes that the evidence of age discrimination presented was sufficient to entitle Britting to recover against Motorola, and certainly sufficient to defend against Motorola's motion for summary judgment on the issue. It is Britting's position that a trial of this issue was required. Considering the evidence presented, along with the testimony of live witness it would have clearly and absolutely, legally cement the case against Motorola under the totality of the facts of the case as to that issue.

Britting is a member of the protected class (above age forty) and was a member at the time of the discrimination. He suffered an

adverse employment action when he was demoted and relegated to answering telephones. Younger persons, less qualified filled his position. He was eventually terminated. He has suffered damages. His employment record is full of high-grade reports and devoid of low-grade reports. The only reason Motorola advanced for the adverse employment action were mere pretext.

Furthermore, Motorola, via its authorized agent, fraudulently created a resignation document, and had it approved without Britting's knowledge, authorization or approval whatsoever. Likewise, Motorola, thereinafter continued its fraudulent conduct by fabricating false employment records falsely reflecting Britting's job performance, and finally, without according Britting his rights, pursuant to Policy #7, terminated him and cheated him out of the thousand of dollars he would have received but for their conduct.

Motorola, did all of the foregoing so as to allow a younger employee to assume his job position and responsibilities while paying those younger employees thousands of dollars less each month than what was being paid to Britting.

However, based on the trial courts erroneous consideration of the evidence presented by Britting, the court below committed reversible error when it granted Motorola's motion on the issue of ADEA. Britting has presented sufficient evidence to defend against a motion for summary judgment and present a factual issue for jury determination.

CONCLUSION

It is Britting's position that in the District Court he advanced sufficient evidence and facts which entitled him to a grant of summary judgment as to the issues of an implied employment agreement, ADEA and fraud and respectfully requests this Court to find for the same.

The District Court improperly granted Motorola's Motions for Summary Judgment because Britting clearly showed that, in the least, there were genuine issues of material fact as to the issues and that the moving party was *not* entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986). The trial court abused it's discretion in ruling in favor of Motorola's motions for Summary Judgment.

Respectfully submitted,

This 16 day of July, 2002.

MULLMAN & ASSOCIATES, P.C.

S/Roy Mullman
Roy Mullman
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief has been prepared in accordance with the provisions set forth in Federal Rule of Appellate Procedure 32(a)(7). Size 14, Times New Roman font. The principal brief is less than 30 pages.

This 16 day of July, 2002

MULLMAN & ASSOCIATES, P.C.

S/Roy Mullman
Roy Mullman
Attorney for Appellant
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CERTIFICATE OF SERVICE

This is to certify that I have this day served two copies of this Appellant's Brief upon counsel for Appellee by mailing a true copy thereof and depositing same in the United States Mail with adequate postage thereon to ensure proper delivery to:

Mary Ann B. Oakley, Esquire
Holland & Knight, LLP
Suite 2000, One Atlantic Center
1201 West Peachtree Street, NE
Atlanta, GA 30309-3400

This 16 day of July, 2002.

MULLMAN & ASSOCIATES, P.C.

S/Roy Mullman
Roy Mullman
Attorney for Appellant
GA Bar # 529277

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-11650-AA

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
July 30, 2002
THOMAS K. KAHN
CLERK

NORMAN A. BRITTING,

Plaintiff-Appellant,

Versus

MOTOROLA INC.,
JOHN DOE, 1-10, and,
ABC CORPORATION, 1-10

Defendants-Appellees

Appeal from the United States District Court for the
Northern District of Georgia

Before BIRCH and CARNES,, Circuit Judges.
BY THE COURT:

Appellant's motion to reinstate his appeal is DENIED. See Rule 42-2(e).

EXHIBIT 12

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NORMAN A. BRITTING,	**:**	**U.S. Court of Appeals**
	:	**Received Clerk**
Plaintiff,	**:**	**August 8, 2002**
	:	**Atlanta, GA.**
vs.	**:**	**CIVIL ACTION NO.**
	:	**02-11650-A**
MOTOROLA, INC., et al.,	**:**	
	:	
Defendants.	**:**	

APPELLANT'S MOTION TO RECONSIDER THE ORDER AND REINSTATE APPELLANT'S APPEAL

COMES NOW, Norman A. Britting, Appellant in the above-referenced matter and respectfully requests that this Honorable Court grant Appellant's Motion To Reconsider the Order To Set Aside The Dismissal and Reinstate Appellants Appeal by showing the following:

Pursuant to Eleventh Circuit Rule 42-2, an appeal dismissed under this rule may be reinstated upon the filing of a Motion to Set Aside the Dismissal and Remedy the Default by showing extraordinary circumstances, accompanied by the required brief and record excerpts, and must be filed within fourteen days after the order dismissing the appeal is entered by the clerk.

EXHIBIT 13

In this case, the clerk of the court filed its Entry of Dismissal on July 30, 2002. Therefore, this motion and the accompanying brief and record excerpts are timely filed prior to August 13, 2002.

Extraordinary circumstances affecting the filing of the required brief and record excerpts in this case are as follows:

On March 21, 2002 Plaintiff/Appellant filed a timely Notice of Appeal with the United States District Court for the Northern District of Georgia, Atlanta Division, of an Order granting Defendant/Appellee's motion for sanctions – in part, granting Defendant/Appellee's motion for summary judgment and granting Defendant/Appellee's motion for default judgment on its counterclaim against Plaintiff/Appellant, the District Court's Order was entered on March 7, 2002.

On March 25, 2002, the Clerk of the District Court notified Appellants that they needed to pay the docketing/filing fee of $105.00 to the U.S. District Court. On March 28, 2002, the Clerk of this Honorable Court notified Appellants that they must pay the $105.00 fee and file the Civil Appeal Statement with the Clerk of the United States Court of Appeals, Eleventh Circuit within fourteen days. On March 28, 2002, Plaintiff/Appellee submitted a money order in the amount of $105.00 to the Clerk. On April 3, 2002, Plaintiff/Appellee submitted its Civil Appeal Statement. On April 16, 2002 the Clerk of the United States Court of Appeals entered a Dismissal of the instant Appeal for

alleged failure to prosecute the appeal, by failing to pay the aforementioned docketing fee.

Thereafter, Appellant filed its Motion to Reinstate the Appeal, along with its civil appeal statement, showing that in fact the docket fee was paid by money order. The money order was received and redeemed by the District Court on April 4, 2002, but apparently an inadvertent accounting error resulted in a showing that the fee had not been paid. After consideration of Appellants evidence of payment and apparently some forensic accounting by the clerk, the appeal was reinstated.

In early April 2002 the clerk of this Honorable Court contacted the parties and expressed a doubt as to whether this Honorable Court had jurisdiction over the case and requested that the parties advise the court of their positions regarding the jurisdictional question of whether a final order was entered by the District Court. Appellant filed its brief regarding jurisdiction showing that a final order had been entered by the District Court, along with its Certificate of Interested Persons and Corporate Disclosure Statement, on or about April 23, 2002.

The Appellant has not received notice from the court as to its decision regarding jurisdiction. The Appellant has not received notice that its brief and record excerpts are overdue.

Considering the above-described issues, whereby the Appellant was placed in a position to explain that in

fact the docket fee was paid, thereby reinstating the once dismissed appeal, which was dismissed due to no failure by the appellant; and whereby the Appellant was placed in a position to explain why this Honorable Court has jurisdiction over the case, thus again facing dismissal and to date not having a decision from the court regarding jurisdiction, create an accumulation of extraordinary circumstances, which in fairness should permit the Appellant to reinstate the appeal and continue the prosecution of this appeal.

WHEREFORE, Appellant respectfully prays that the Honorable Court grant Appellant's Motion to Reconsider the Dismissal and furthermore, reinstate Appellant's Appeal, allowing the Appellant to file its brief and record excerpts.

Respectfully submitted, this 8th day of August 2002.

MULLMAN & ASSOCIATES, P.C.

S/Roy Mullman
Roy Mullman
Georgia State Bar No.: 529277
Attorney for Plaintiff

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CERTIFICATE OF FONT SIZE

The undersigned hereby certifies that the foregoing pleading was prepared in the following font: Times New Roman 14 point.

MULLMAN &ASSOCIATES, PC

S/Roy Mullman
Roy Mullman
Georgia State Bar No.: 529277
Attorney for Plaintiff

3475 Lenox Road, NE
Suite 980
Atlanta, GA 30326
(404) 365-8800

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing Pleading upon counsel of record by placing a copy of same in an envelope with sufficient postage affixed thereon and depositing in the U.S. mail, addressed as follows:

Mary Ann B. Oakley, Esquire
Holland & Knight, LLP
Suite 2000, One Atlantic Center
1201 West Peachtree Street, NE
Atlanta, GA 30309-3400

This 8th day of August 2002.

MULLMAN &ASSOCIATES, PC

S/Roy Mullman
Roy Mullman
Georgia State Bar No.: 529277
Attorney for Plaintiff

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Suite 980
Atlanta, GA 30326
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-11650-AA

FILED
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ELEVENTH CIRCUIT
August 29, 2002
THOMAS K. KAHN
CLERK

NORMAN A. BRITTING,

Plaintiff-Appellant,

Versus

MOTOROLA INC.,
JOHN DOE, 1-10, and,
ABC CORPORATION, 1-10

Defendants-Appellees

Appeal from the United States District Court for the
Northern District of Georgia

Before BLACK, BARKETT and WILSON, Circuit Judges.
BY THE COURT:

Appellant's motion for reconsideration of this Court's order of July 30, 2002, denying motion to reinstate is DENIED.

EXHIBIT 14